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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 1286

JAMES H. MATTHEWS & CO.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

James H. Matthews & Co. petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case, entered on February 9, 1966.

OPINIONS BELOW

The decision of the National Labor Relations Board (Appendix B, *infra*, p. A19) is reported at 149 N.L.R.B. No. 64. The opinion of the United States Court of Appeals for the Eighth Circuit (Appendix A, *infra*, p. A1) is reported at 354 F.2d 432.

JURISDICTION

The judgment of the court of appeals sought to be reviewed was entered on February 9, 1966, after a timely petition for hearing was denied on February 8, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

Whether, assuming that petitioner committed Section 8 (a) (1) violations, such conduct is sufficient to support the conclusion of "bad faith" in refusing to recognize the union pursuant to its claimed majority status and the consequent Board order under Section 8 (a) (5) to bargain collectively with the union when there existed a substantial question as to the appropriate unit and evidence (which petitioner asserts was uncontradicted) of no interest by numerous employees.

STATUTE INVOLVED

The following sections of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., §151 *et seq.*) are involved: Sections 7, 8 (a) (1), 8 (a) (5), 9 (b) and Section 10.

STATEMENT

This petition to review an order of the National Labor Relations Board was brought in the court of appeals by petitioner on October 27, 1964, pursuant to Section 10 of the National Labor Relations Act, as amended. The Board cross petitioned for enforcement of its order.

Petitioner is a Pennsylvania corporation engaged in the manufacturing of, among other things, bronze memorial tablets and plaques. Its bronze division consists of three plants one of which is located in Searcy, Arkansas (R. 5).[1]

On January 11, 1964, the union (International Association of Machinists, AFL-CIO) in a letter to petitioner's Searcy plant claimed the employees had requested the union to represent them in all matters pertaining to employment. The letter suggested a meeting on January 15 or 16 for the purpose of showing such representation. Petitioner answered the letter on January 14 and advised that it would recognize the union and bargain if certified as a result of an election conducted by the Board (R. 248-250).

On February 3 the union in a letter to petitioner asserted it represented a majority of production and maintenance employees excluding supervisors as defined in the Act and again requested recognition and collective bargaining. Petitioner answered the letter on February 13 and suggested that the matter be settled by an election taking the position that this procedure would be in the best interest of the employees and would better effectuate the purposes of the Act (R. 276-278).

An unfair labor practice charge was filed pursuant to which a complaint was issued by the Regional Director. It alleged violations of Section 8 (a) (1) and Section 8 (a) (5) setting forth essentially that petitioner deliber-

1. "R." refers to the printed record in the court of appeals.

ately engaged in a course of unlawful conduct for the purpose of undermining and destroying the union's alleged majority status. Four so-called leadmen were alleged to be supervisors within the meaning of Section 2(11) and were accused of committing Section 8 (a) (1) violations. Petitioner in its answer denied the claimed supervisory status and material allegations of the complaint. Affirmatively, petitioner challenged the union's majority status and set forth that the authorization cards were obtained by misrepresentation because employees were told variously that by signing the cards they were merely registering attendance at a union meeting and the only purpose in signing the card was to have an election in the plant.

The cause was tried and the Trial Examiner found the union had sufficient cards as of January 11 (38 out of 68); the four leadmen were supervisors; petitioner had committed Section 8 (a) (1) violations as alleged and had exhibited bad faith in refusing recognition by a check of the cards, petitioner's primary purpose being to gain time and conduct a campaign to destroy the union's majority status (R. 35-36). The Trial Examiner held also that the signing of authorization cards in the absence of "real" proof of fraud or deceit, called for a finding that the employees knew what they were doing despite the fact that they might have been told otherwise (R. 35).

The Board thereafter adopted the Trial Examiner's opinion and entered its order accordingly (R. 1-4).

Petitioner filed a petition with the court of appeals to review the Board's order (R. 242). The court of appeals sustained the rulings and order of the Board and held that they were entitled to enforcement in all respects.

REASONS FOR GRANTING THE WRIT

The ruling of the court below is in direct conflict with the principles enunciated in the following cases from other appellate courts: *N.L.R.B.* v. *A & P Tea Co.*, 346 F.2d 936 (C.A. 5); *N.L.R.B.* v. *Flomatic Corp.*, 347 F.2d 74 (C.A. 2); *Reilly Tar & Chemical Corp.* v. *N.L.R.B.*, 352 F.2d 913 (C.A. 7); *Phelps-Dodge Corp.*, 354 F.2d 591 (C.A. 7). In view of these considerations and the obvious importance of employees' rights as set forth in Section 7 of the National Labor Relations Act, as amended, the decision should be reviewed by this Court.

1. The court in *Reilly Tar & Chemical Corp., supra,* agreed with the Board that employer violated Section 8 (a) (1) by interrogating employees who signed authorization cards, threatened them with loss of benefits and unlawfully assisted them in withdrawing their designation of the union as bargaining agent. Despite this finding, the court said the employer was justified in its refusal to recognize and bargain because uncertainty existed as to the proper bargaining unit and three employees "desired" to withdraw from the union. By comparison and without detailing that employer's activities with respect to interrogations and threats, such activities were no more flagrant or coercive than in the instant case. In fact, the employer's violations there appeared to be infinitely more gross.

Uncertainty as to the extent of the bargaining unit also existed in the instant case as demonstrated by the very close factual questions of whether the leadmen were supervisors and therefore to be excluded from the claimed unit. In *Phelps-Dodge Corp.* v. *N.L.R.B., supra,* the union notified the employer by mail that it represented all employees in the warehouse, when in fact the appropriate unit consisted of only the five warehousemen. The court said this was an ambiguity in the unit for which representation was claimed, and therefore created good-faith doubt on the part of the employer.

Under the admitted facts of the instant case petitioner fails to see how the foregoing cases may be distinguished. The real issue was not whether the leadmen were supervisors but actually whether petitioner in good-faith was justified in its assumption and belief that they were not. The court below overlooked these standards that have obviously been readily applied by other appellate courts.

2. There is apparent inconsistency among the decisions in treating the effect of Section 8 (a) (1) violations. We have seen that in *Reilly Tar & Chemical Corp., supra,* the employer's violations were certainly of an aggravated nature. In *N.L.R.B.* v. *Flomatic Corp.*, 347 F.2d 74 (C.A. 2) the court sustained unfair labor practices by the employer but refused to enforce compulsory bargaining. That court acknowledged the Board's right to apply the remedy but at the same time cautioned that courts "have implicitly recognized that the bargaining order remedy should be applied with restraint, * * *" (at page 79). Cases were cited in which the remedy was applied but the court pointed out that those cases involved "glaring violations". Although no unlawful refusal to bargain was involved in that case, it illustrates the struggle appellate courts are having with the problem of compulsory bargaining.[2]

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2. The Court said: "A bargaining order, however, is strong medicine. While it is designed to deprive employers of a 'chance to profit from a stubborn refusal to abide by the law,' *Franks Bros. Co.* v. *N.L.R.B., supra,* 321 U.S. at 705, 64 S. Ct. at 819, and although it undoubtedly operates to deter employers from adopting illegal intrusive election tactics, its potentially adverse effect on the employees' § 7 rights must not be overlooked. See *Medo Photo Supply Corp.* v. *N.L.R.B., supra,* 321 U.S. at 688, 697-698, 64 S. Ct. at 835, 839-849 (Rutledge, J. dissent). That section protects the right of employees to join or refrain from joining labor organizations. And that right is implemented by § 9 (c) (1) which provides for representation elections by secret ballot. Since a bargaining order dispenses with the necessity of a prior secret election, there is a possibility that the imposition of such an order may unnecessarily undermine the freedom of choice that Congress wanted to guarantee to the employees, and thus frustrate rather than effectuate the policies of the Act."

Even the Board has apparently relaxed its position and now holds that Section 8 (a) (1) violations must be "extensive". In *Hammond & Irving, Inc.*, 154 N.L.R.B. No. 84, the Board held that unlawful questioning of 6 employees out of 110 was not so "flagrant" to warrant a conclusion of bad faith.

3. The appellate decisions are also in conflict concerning treatment of union authorization cards signed by employees. The court below ruled that the authorization cards were clear and unambiguous on their face and sustained the Board in its conclusion that their validity may be attacked only by showing "real" fraud. In *N.L.R.B.* v. *A & P Tea Co., supra,* it was contended by the employer that employees' cards were obtained by coercion and "improper influence". The court at page 941 said this was arguable particularly with respect to one employee and significantly refused to require proof of fraud. The court said:

> "Authorization cards are certainly appropriate indicators of union strength in a bargaining unit, but in a case in which the company has information which leads them reasonably to believe that certain of the cards do not represent the true wishes of the employees, it is difficult to see how a cross-check by an impartial arbiter would be particularly useful. In a recent case, the Board itself has impliedly recognized that the offer of a cross-check of authorization cards does not impose a duty upon the company to submit to the check or suffer the consequences of a refusal-to-bargain charge. *Superex Drugs, Inc.*, 150 NLRB 97 (1965)."

Decisions of the Eighth Circuit are conflicting on this principle. In *N.L.R.B.* v. *Johnnie's Poultry Co.*, 344 F.2d 617, the court in dealing with the issue of good faith doubt of majority status pointed out that the employer had conducted an interview of certain employees. Many told

him they (as in the instant case) signed cards on the belief that they were requesting an election (at page 620). This evidence was deemed admissible and the ruling is in direct conflict with the requirement of "real" fraud in the instant case. The conflict is further emphasized by the Eighth Circuit's reliance in the above case upon a statement by the Board Chairman which illustrates that cards are not reliable:

> "Board Chairman McColloch, in an address before the Labor Relations Section of the American Bar Association in 1962, stated:
>
> 'In 58 elections, the unions presented authorization cards from 30 to 50% of the employees and they won 11 or 19% of them. In 87 elections, the unions presented authorization cards from 50 to 70% of the employees; and they won 42 to 52% of them. In 57 elections, the unions presented authorization cards from over 70% of the employees, and they won 42 or 74% of them.' 1962 proceedings, Section of Labor Relations Law, American Bar Association, pp. 14, 17."

Thus we see that the ruling of the Court below greatly affects employers and employees in the exercise of their rights under the National Labor Relations Act, as amended. The decision is inconsistent with decisions of other courts of appeals and is obviously important in effectuating the overall policies of the Act.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the writ of certiorari should be granted.

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APPENDIX A

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 17,880

Jas. H. Matthews & Co., Petitioner, v. National Labor Relations Board, Respondent.	On Petition for Review of an Order of the National Labor Relations Board.

[December 29, 1965.]

Before VOGEL, MATTHES and RIDGE, Circuit Judges.
RIDGE, Circuit Judge.

This is a petition by Jas. H. Matthews & Co. to review a decision and order of the National Labor Relations Board pursuant to § 10 of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519; 29 U.S.C.A., § 151, et seq.). The Board in its answer and cross-petition seeks enforcement of its order as reported at 149 NLRB No. 18.

In the case at bar the Board agreed with the Trial Examiner that the Company violated § 8(a)(1) of the Act by means of threats, coercive interrogation, surveillance and the maintenance of an unlawful, no-solicitation rule, all of which interfered with, restrained and coerced appellant's employees in the exercise of their rights under § 7 of the Act. The Board also found that the Company violated § 8(a)(5) and (1) of the Act by refusing to bargain with a Union designated by a majority of its employees.

This Court has jurisdiction of the alleged unfair labor practices since they occurred at Searcy, Arkansas, within this Circuit.

Petitioner is a Pennsylvania corporation, with one of its three plants, the Bronze Division, located in Searcy, Arkansas. This plant specializes in the manufacture of bronze memorial tablets and plaques. The General Superintendent of the Bronze Division is Roy Randles, who is stationed in Pittsburgh, Pennsylvania. Immediately under him in authority is William Morton, Plant Superintendent at the Searcy Plant. This plant is divided into factory and foundry divisions. Morton supervises the operation of the foundry section which has thirty-five employees, while his assistant, James Landis, supervises work in the factory which employs thirty-seven others. The factory is further subdivided into four departments: (1) pattern set-up; (2) tooling; (3) coloring; and (4) shipping. These departments have twelve, eleven, six and five employees, respectively. Finally, each department is headed by an individual designated a "leadman" by the Company.

The instant litigation arises out of the efforts of the International Association of Machinists, A.F.L.-C.I.O., to organize petitioner's employees, beginning in January, 1964. The Trial Examiner found that during the ensuing period of organizational activity, petitioner, through Division Superintendent Randles, Plant Superintendent Morton, Office Manager Russell, and Leadman Harmon, talked to many Company employees concerning their interest in the Union. It was determined by the Trial Examiner and the Board that these conversations "in full effect constitute interference at least, and real intent to coerce and intimidate employees (of appellant) in their concerted activities for the purpose of collective bargaining."

The primary issue presented by the instant appeal is whether or not petitioner violated § 8(a)(5) and (1) of the Act by refusing to bargain with the Union when recognition was first sought, after it claimed majority status on January 11, 1964.

I

The first question to which we turn is whether or not factory "leadmen" are supervisors within the meaning of § 2(11) of the Act. This must first be determined in order to find the proper place of those employees, either in or out of the bargaining unit here considered. A determination of that question will also control whether certain of the alleged § 8(a)(1) violations attributable to one or more leadmen are binding on petitioner. Next, we shall examine the merits of petitioner's contention that "(t)here is no substantial evidence to support a finding that the Union had a majority status as of January 11, 1964." Finally, we shall discuss the nature and effect of petitioner's refusal to recognize the Union on the last-above-mentioned date.

Section 2(11) of the Act defines a "supervisor" as:

> "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

It is well settled law that "(t)his section is to be interpreted in the disjunctive, * * * and the possession of any one of the authorities listed in Sec. 2(11) places the employee invested with (such) authority in the supervisory class." *Ohio Power Co.* v. *NLRB*, 176 F.2d 385, 387 (6

Cir.), cert. denied, 338 U.S. 899. Moreover, § 2(11) "does not require the exercise of the power described for all or any definite part of the employee's time. It is the existence of the power which determines the classification." *Id.*, at 358. Accord, *NLRB* v. *Edward G. Budd Mfg. Co.*, 169 F.2d 571, 575, 576, 579 (6 Cir.), cert. denied, 335 U.S. 908; *NLRB v. Leland-Gifford Co.*, 200 F.2d 620, 626 (1 Cir.). However, "(i)t is not alone that (the employee) may hire or fire or lay off or discipline. He must do so in the interest of the employer. * * * (T)here must be a determination of status based upon the 'nature' of the supervisory position and 'how completely the responsibilities of the particular position identify the holder of the position with management,' all 'because of the infinite possible variations in responsibilities enumerated in § 2(11)' * * *." *International Union of United Brewery etc. Workers* v. *NLRB*, 298 F.2d 297, 303 (D.C. Cir.), cert. denied, 369 U.S. 843 (quoting from *Local 636, Plumbers* v. *NLRB*, 287 F.2d 354, 362 (D.C. Cir.). And where, as here, "the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited. * * * (T)he Board's determination * * * is to be accepted, if it has 'warrant in the record' and a reasonable basis in law." *NLRB* v. *Hearst Publications*, 322 U.S. 111, 131; accord *NLRB* v. *Lee-Rowan Company*, 316 F.2d 209, 212 (8 Cir.), cert. denied, 375 U.S. 827.

On the basis of our analysis of the record, we are of the opinion that the Board's determination that such leadmen are in fact supervisors has both the necessary warrant in the record and a reasonable basis in law. Of controlling importance is the testimony that the leadmen assign work to the employees in their departments; trans-

fer employees from job to job, as necessary in their sole opinion; pass on employee requests for time off; effectively recommend discipline; and oversee the other employees' work, as well as checking its quality. *NLRB* v. *Syracuse Stamping Co.*, 208 F.2d 77, 79 (2 Cir.); *Eastern Greyhound Lines* v. *NLRB*, 337 F.2d 84 (6 Cir.); *NLRB* v. *Southern Bleachery & Print Works*, 257 F.2d 235, 239 (4 Cir.), cert. denied, 359 U. S. 911. In addition, the record discloses that the leadmen meet regularly with Factory Foreman Landis, occasionally with Plant Superintendent Morton, and on one occasion all four leadmen attended a training session in Pittsburgh, the Company Headquarters. Of further significance in this connection is the testimony that the leadmen are paid from eleven to forty cents an hour more than the regular employees in their departments, and that petitioner's officials represented that the leadmen were their supervisors and the regular employees so regarded them. *NLRB* v. *Schill Steel Products, Inc.*, 340 F.2d 568, 571-572 (5 Cir.). Finally to be noted is the fact that if the leadmen were not supervisors, Factory Foreman Landis would have to exercise detailed supervision over some thirty-seven employees in the departments involved in a variety of tasks and handling products at many stages of completion in the production process. The unlikelihood of that situation occurring was properly considered by the Board. *Vega, et al.* v. *NLRB*, 341 F.2d 576, 577 (1 Cir.); *NLRB* v. *Supreme Dyeing & Finishing Corp.*, 340 F.2d 493, 494 (1 Cir.); *NLRB* v. *Mt. Clemens Metal Products Co.*, 287 F.2d 790, 791 (6 Cir.), enforced as modified, 126 NLRB 1297, 1298, n. 4.

In short, the record here clearly supports a finding that the four leadmen are clothed "with genuine power to perform a supervisory function" (*NLRB* v. *Leland-Gifford*, *supra*) and the Board properly classified them as super-

visors within the meaning of § 2(11) of the Act. Thus we hold that the Board correctly excluded leadmen from the bargaining unit and that petitioner is responsible for their conduct in connection with the found § 8(a)(1) violations to be discussed *infra*. *NLRB* v. *Schill Steel Products, Inc., supra.*

As a consequence of the above determination, the number of employees eligible for the bargaining unit is reduced from seventy-two to sixty-eight. The Union thus needed only thirty-five signed authorization cards to comprise a majority.

The Union began the organizing campaign in question in January, 1963. In connection therewith, a meeting was held at a truck stop on January 6th, which was attended by twenty-five employees. A second meeting was held on the afternoon of January 10th. The next day, January 11th, the Union made its initial claim of majority and a bargaining demand. By that date, thirty-eight of petitioner's seventy-two employees had signed cards. On January 14th, petitioner replied by letter that it would bargain with the Union only if it were certified pursuant to a Board election. On February 3rd, the Union reiterated that it was "ready and willing to prove majority status" and that it requested recognition and bargaining. Once more, however, the Company replied that it would not bargain unless the Union was certified by the Board, and further asserted that it had a "reasonable doubt" of the Union's majority. No bargaining has taken place. It was against this background that the presently disputed Board finding was made "that Respondent violated Section 8(a)(5) and (1) of the Act in refusing to recognize and bargain with the Union as the representative of a majority of its employees"—to which issue we now turn.

Section 8(a)(5) of the Act requires an employer "to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a)." The latter section provides that "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all employees in such unit for the purposes of collective bargaining * * *." Although § 9(c)(1) provides machinery by which the question of representative status may be determined in a Board-conducted election, it is well-settled that an election is not the exclusive instrumentality by which a Union's representative status may be established. See *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62, 71-72. Consequently, there is no absolute right vested in an employer to demand an election. *NLRB* v. *Decker*, 296 F.2d 338, 341 (8 Cir.); *NLRB* v. *Trimfit of California, Inc.*, 211 F.2d 206, 209 (9 Cir.). Rather, it is established that when a Union has obtained authorization cards signed by a majority of the employees in an appropriate unit, designating the Union as their bargaining representative, an employer violates § 8(a)(5) of the Act if, absent a good faith doubt of the Union's majority status, he refuses to recognize and bargain with the Union.

II

In the instant case, as note *ante*, the record shows that the Union had obtained authorization cards from thirty-eight employees by January 11th, the date it requested recognition. The Board refused to count one of these cards because the employee who signed it (White) was unable to read, and executed the card because the Union adherents soliciting him to do so represented to him that the Union card would only be used to obtain an election. It is petitioner's position that at least three other cards

signed by employees also ought not to have been counted "since their intention was clearly indicated that they did not authorize the Union to represent them and were misled into signing the cards." The three cards thus challenged are those signed by employees Cullum, Cook and Waller.

This issue was the subject of extensive testimony before the Trial Examiner. He concluded that the authorization cards signed by such employees allegedly under a misapprehension as to their purpose, i.e. that they were to be used solely to bring the Union issue to a vote, should be counted in the determination as to the Union's majority status. It is our opinion that this conclusion is required by the facts and the law.

The authorization cards in issue are clear on their face. They recite that the named employee authorizes the Union to represent him for the purposes of collective bargaining and to negotiate in his behalf regarding wages, hours and other terms and conditions of employment. At the January 6th meeting, *ante*, at which most of the cards were signed, there is testimony in the record that Union representative Harris read an authorization card aloud and explained that if a majority of the employees signed such cards, the Union had the option of demanding recognition on the basis of the cards or of seeking an election. Such testimony was disputed, as was most of the factual testimony herein, but the Trial Examiner determined this issue of credibility in favor of the Union's witnesses, including Harris, and we are, of course, bound by that determination. We shall return to this credibility question *infra*.

Employee Cullum, whose card is presently challenged, attended the January 6th meeting and heard Union representative Harris' speech, *ante*. Afterwards, he filled out an

authorization card and signed it. He then crossed out his signature because he was "undecided" and "confused". Thereafter, as he testified at the hearing, he printed his name on the card—the card contains spaces for both a signature and a printed name—and he placed the card on the table where the other employees were putting their signed cards. The card was then signed by employee Underwood, as a witness. Despite Cullum's reservation expressed at the hearing, *ante*, we feel the Board properly concluded that his authorization card was valid. "It has been held that an employee's thoughts (or afterthoughts) as to why he signed a union card, and what he thought that card meant, cannot negative the overt action of having signed a card designating a union as bargaining agent." *Joy Silk Mills, Inc.* v. *NLRB*, 185 F.2d 732, 743 (D.C. Cir.), cert. denied 341 U.S. 914 (and cases cited therein). In the instant case, after crossing out his signature, Cullum clearly manifested his intent to designate the Union as his bargaining representative by printing his name on the card and turning it in to the Union. As the authorization card was perfectly clear and unambiguous, Cullum's unexpressed reservations, if indeed he had any, cannot serve to invalidate the otherwise valid designation of the Union as his bargaining representative. *Cumberland Shoe Corp.*, 144 NLRB 1268; *Winn-Dixie, Inc.*, 143 NLRB, No. 89. Petitioner's reliance on *Fort Smith Broadcasting Co.* v. *NLRB*, 341 F.2d 874 (8 Cir., 1965) is misplaced. In that case, an employee's defection from the Union, which he communicated to a member of Management, was held to have effectively negated his earlier authorization of the Union and warranted the Company's rejection of the Union's bargaining demand on the basis of a good-faith doubt of majority status. In the instant case, however, there is no showing that Cullum, assuming he had reservations about his designation of the Union, ever communicated those

reservations to anyone, a member of Management, or otherwise. In light of the foregoing, we hold that Cullum's authorization card was correctly held to be valid by the Board.

The second card challenged by petitioner was signed by employee Cook. Cook signed his authorization card on January 7th, after being solicited by fellow employee Gayler who, according to Cook's testimony, told him that "the purpose of the card, to begin with, was to get the union in for a vote only." Petitioner seeks to exclude Cook's card on two grounds: that he was misled by Gayler as to the reason for signing the card; and because he "effectively cancelled his authorization card." Petitioner's contention that employee Galyer told Cook that the card would be used only to obtain an election, is wholly without merit for the elementary reason that there is no showing here that Gayler was an agent of the Union or that he was entitled to bind it in any way. See, e.g., *NLRB* v. *Local 239, International Brotherhood of Teamsters, etc.*, 340 F.2d 1020, 1022 (2 Cir.). More importantly, as in the case of Cullum, *ante*, since the authorization card is clear and unambiguous on its face and recites expressly that the signer authorizes the Union to represent him for the purposes of collective bargaining, Cook's signed card must likewise be viewed as binding and valid for the purpose of determining majority status on January 11th. Thus, the Board's conclusion is correct—that "(t)he very act of signing an authorization card by an employee, absent real proof of fraud or deceit, calls for a finding that the employee knew what he was doing." It is petitioner's contention that the circumstances surrounding the signing of the authorization cards should have been determined by the testimony of its witnesses, rather than those of the Union. As noted earlier, there was a good deal of conflict in the testimony. This

Court has long recognized, however, that resolutions of credibility are matters for determination by the trier of fact. *NLRB* v. *Morrison Cafeteria Co.*, 311 F.2d 534, 538 (8 Cir.) and cases therein cited; *NLRB* v. *Byrds Mfg. Corp.*, 324 F.2d 329, 332 (8 Cir.). Thus it is not our province to say that the testimony of the witnesses adduced by General Counsel is less credible, less responsible, and weaker than that of respondent's witnesses, as respondent urges. Since the Trial Examiner had an opportunity to observe the witnesses appearing before him who testified concerning matters which were wholly factual and based upon contradictory testimony, we are bound by his credibility resolutions in this case

It is also asserted that Cook "effectively withdrew" from the Union. This is based upon Cook's testimony that after signing an authorization card on January 7th, he attended the January 10th Union meeting, and a day or two later wrote a letter to the Union requesting his card back. This letter allegedly was neither written, dated, nor addressed by Cook, but was merely left with an undisclosed individual. Thereafter, the letter was received by Union representative Harris on January 23rd, enclosed in an envelope addressed to Harris and postmarked January 22nd. In the light of the foregoing, we are unable to see how this "letter of withdrawal" can possibly be relevant to the question of the Union's majority status on January 11th, the date the Union requested recognition, as a principal's revocation of his agent's authority is ineffective until communicated to the agent. Restatement (2d) Agency, § 119(c), 1958; *Tinley Park Dairy Co.*, 142 NLRB 683, 685-686. Cf. *NLRB* v. *Hunter Engineering Co.*, 215 F.2d 916, 920 (8 Cir.).

The third authorization card which petitioner would have us declare invalid was signed by employee Waller. Waller,

like Cook, testified that the employee who solicited him to sign his card (here, employee Simpson) told him that the card would be utilized "so they could bring it (the question of the Union) to a vote." It is clear that Waller's card was also properly counted in determining the Union's majority status on January 11th, for the reasons set forth regarding the validity of Cook's authorization, *ante*.

In light of the foregoing, the Trial Examiner and Board found that "the majority of the employees within the accepted bargaining unit had authorized the Union, as of the demand date of January 11, to represent them." This finding is clearly correct.

III

Notwithstanding the above, petitioner contends that "(t)here is no substantial evidence to support a finding that petitioner did not have reasonable cause to doubt the Union's claimed majority status as of January 11, 1964, and was guilty of bad faith in refusing to recognize the union." The question thus presented is whether petitioner's refusal to bargain was permissible under the Act. "It has been held that an employer may refuse recognition to a union when motivated by a good faith doubt as to that union's majority status." *Joy Silk Mills* v. *NLRB, supra,* at 741, citing *North Electric Mfg. Co.* v. *NLRB,* (6 Cir.) 123 F.2d 887; *NLRB* v. *Chicago Apparatus Co.,* (7 Cir.) 116 F.2d 753. "When, however, such refusal is due to a desire to gain time and to take action to dissipate the union's majority, the refusal is no longer justifiable and constitutes a violation of the duty to bargain set forth in section 8(a)(5) of the Act." *Joy Silk Mills* v. *NLRB, supra,* at 741, citing *NLRB* v. *Federbush Co., Inc.,* (2 Cir.) 121 F.2d 954, 956; *NLRB* v. *Remington Rand, Inc.,* (2 Cir.) 94 F.2d 862, 868-869.

We think there was substantial evidence from which the Board could reasonably conclude that the original refusal of recognition was in bad faith. Cf. *NLRB* v. *Consolidated Machine Tool Corp.*, (2 Cir.) 163 F.2d 376, cert. denied 332 U.S. 824, 68 S.Ct. 164, 92 L.Ed. 399. It is clear that the Union was at all times here relevant ready and willing to demonstrate its majority status to petitioner. Of decisive bearing in this regard is the Union's initial letter to petitioner, dated January 11th, the import of which was clearly to the effect: (1) that the Company's employees had requested it to represent them for the purpose of collective bargaining; (2) that a meeting for that purpose was requested; and (3) that the Union was prepared to prove its majority status. "Where, as in this case, the union had proof of its majority status readily available and (petitioner) chose not to learn the facts, it 'took the chance of what they might be.'" *NLRB* v. *Elliot-Williams Co., Inc.*, 345 F.2d 460 (7 Cir.) decided April 17, 1965, citing *NLRB* v. *Remington-Rand, Inc.*, 94 F.2d 862, 869 (2 Cir.), cert. denied 304 U.S. 576, 585; *NLRB* v. *Dahlstrom Metallic Door Co.*, 112 F.2d 756 (2 Cir.).

Even more clearly illustrative of petitioner's lack of good faith in the case at bar is its conduct designed to suppress the Union in connection with petitioner's found § 8(a)(1) violations, *ante*. These consist of threats, coercive interrogation and surveillance of employees both before and after January 11th, the date recognition was sought. Cf. *NLRB* v. *Wheeling Pipe Line, Inc.*, 299 F.2d 391 (8 Cir.); *Joy Silk Mills* v. *NLRB, supra.* In connection with these found § 8(a)(1) violations, petitioner's present contention is that the record does not indicate that it created an atmosphere of opposition to the Union's organizational activities, and that the General Counsel has

failed to sustain the burden of proof in this regard. Thus the issue here is whether there is substantial evidence in the record as a whole which supports the Board's findings of § 8(a)(1) violations. There is evidence in the record before us that petitioner, through its responsible agents, threatened employees with economic reprisals, withdrawal of normal promotions and raises, discontinuance of a group insurance plan, discontinuance of a profit-sharing plan, and cancellation of proposed plant expansion, if they became members of the Union; surveillance of a meeting place and Union activities of its employees; that petitioner solicited employees to withdraw from the Union; and since August 1, 1963, the Company has maintained in effect a rule prohibiting employees from soliciting on Company property without permission.

In this connection, there is testimony in the record that on the morning of January 7th, the day after the first Union meeting *ante,* department head Larry Harmon approached employee T. J. Underwood while the latter was at work, and asked, "(H)ow did the meeting go last night?" Underwood replied, "(F)ine." To this, Harmon retorted, "(Y)ou had better drop this, drop it or it will mess you up in your department." Shortly thereafter, on the same day, Harmon again approached Underwood, and this time asked him, "T. J., who is pushing the union?" Underwood replied, "I am, Larry." To this, Harmon then replied, "(I)f you don't drop it, it is going to mess you up in your department and you won't have no more promotions or raises, we won't have no more promotions or raises for you." Two days later, Harmon again talked to Underwood, and this time told him, "T. J., if a man in my department goes union, I'll make it awfully rough on him." That same day, Office Manager James Russell was assisting Underwood in cancelling his Company Pension

Plan when he said, "T. J., I hope you know what you are doing." Underwood replied, "I think I do, Rusty," to which Russell replied, "Well, I guess you know, as of Monday morning (the day of the Union meeting), this Plant has ceased to grow." At this point, Harmon entered the conversation and added, "Yes, and not only that, but you will lose all of your insurance, profit-sharing, and all of your company benefits." No extended discussion is needed to establish that these and similar statements were plainly coercive and thus violations of the Act. *Bituminous Material & Supply Co.* v. *NLRB*, 281 F.2d 365, 369 (8 Cir.); *NLRB* v. *McCarthy Motor Sales Co.*, 309 F.2d 732, 734 (7 Cir.). Similarly, it is clear that Plant Superintendent Morton's statement to employee Stephenson, that "fooling with the union" was going to cause him to lose his Company insurance, was also violative of the Act. See *NLRB* v. *American Pearl Button Co.*, 149 F.2d 311, 315 (8 Cir.). We view in a like manner the testimony that Bronze Division Head, Randles, told Underwood that he had intended to move a vase machine to the Searcy Plant, but that since "all of this trouble has come up" he had changed his mind because he "didn't want to get all his eggs in one basket." In this connection, Harmon stated, "If we get a union in here, we won't get this vase department put in our plant."

In addition to the above, the Trial Examiner and Board also found that petitioner had violated § 8(a)(1) of the Act by means of unlawful surveillance and the maintenance of an unlawful "no solicitation rule."

In regard to employee surveillance, there is testimony in the record that Plant Superintendent Morton, Factory Foreman Landis, and Office Manager Russell were present at a truck stop where the second Union meeting took place on the afternoon of January 10th, *ante*. The meeting was held in a back room at the truck stop, and the named

Company representatives were present in the main dining room. At the conclusion of the meeting, Morton and Russell had not left the diner and there is testimony by seven employees there present that Russell had a list of the Company's employees fastened to a clipboard and was seen by the employees to be checking off the names of those employees leaving the meeting. With respect to this incident, petitioner would argue the question of credibility and we need only refer to our earlier comments on this question, *ante*.

A third type of § 8(a)(1) violation found by the Board in the case at bar was the maintenance of a no solicitation rule by the Company. This finding was based upon evidence that upon being hired, each of petitioner's employees received an "Employee Handbook" from the Company. Included in the handbook is the statement, "Violation of any of the following rules of employee conduct is cause for prompt dismissal or other disciplinary action." The fifteenth rule thus listed forbids "soliciting on Company property without permission." The meaning given this rule by the Company was admitted by Division Superintendent Randles to require permission before tolerating any solicitation on Company property, even during non-working time. The Trial Examiner's conclusion, adopted by the Board, was that "such rule (as it is enforced) is in violation of Sec. 8(a)(1)." "A non-solicitation rule is unlawful if applied to non-working time as well as to working time. *J. R. Simplot Company Food Processing Division*, 137 NLRB 1552, 1553; *Remington Rand Corporation*, 141 NLRB 1052, 1056." We feel the correctness of such determination is beyond question. *Republic Aviation Co.* v. *NLRB*, 324 U.S. 793; *NLRB* v. *United Aircraft Corp.*, 324 F.2d 128, 129 (2 Cir.), cert. denied, 376 U.S. 951.

Notwithstanding the above, petitioner relies upon *Sinko Mfg. & Tool Co.*, 149 NLRB, No. 21, for the proposition that "an uninforced no-solicitation rule does not violate the Act," and that the record in the instant case "shows conclusively that the no-solicitation rule has never been enforced or maintained with respect to employees' solicitation during their own time." In regard to this contention, we point out, first, that it is well established that "(w)hether (an employer) infringed upon its employees' freedom to engage in union or concerted activity * * * depends upon the reasonably foreseeable effects of its conduct upon its employees." *NLRB* v. *Walton Manufacturing Co.*, 289 F.2d 177, 180 (5 Cir.). As the no solicitation rule involved herein, on its face would ban perfectly legal Union solicitation on non-working time, and as the Company never gave notice of any rescission of the rule (see *Time-O-Matic, Inc.* v. *NLRB*, 264 F.2d 96, 101 (7 Cir.) or a purpose not to so interpret it, an employee desiring to engage in Union solicitation "might well be deterred, or else reasonably assume that he acted at his peril." *NLRB* v. *Walton Manufacturing Co., supra.* As aptly stated by the Second Circuit in holding a similar rule unlawful because of its breadth (*NLRB* v. *Miller*, 341 F.2d 871, 874):

> "The true meaning of the rule might be the subject of grammatical controversy. However, the employees of respondent are not grammarians. The rule is at best ambiguous and the risk of ambiguity must be held against the promulgator of the rule rather than against the employees who are supposed to abide by it."

Petitioner's reliance on *Sinko Mfg. & Tool Co., supra*, is misplaced. *Sinko* involved, in relevant part, a rule prohibiting solicitation which was found to have been posted by the employer to aid one of two competing unions. In

so finding, the Board noted that while the no solicitation rule was too broad, the complaint did not allege such undue broadness to be itself violative of the Act. In these circumstances, the Board did not make an unfair labor practice finding on the basis of the rule, itself, but it noted in passing that the rule was too broad and "advised" the employer to clarify its rule to "make it obvious to employees that solicitation is prohibited only on company time and in work areas of the plant." (149 NLRB, No. 21.)

In light of the foregoing, the rulings and order of the Board are in all respects entitled to enforcement. A decree will be entered so ordering.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

JAS. H. MATTHEWS & CO. and INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO	Case No. 26-CA-1736

Decision and Order

On July 9, 1964, Trial Examiner Arthur E. Reyman issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices in violation of the Act, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the Trial Examiner's Decision attached hereto. Thereafter, the Respondent and the General Counsel filed exceptions to the Trial Examiner's Decision and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision and the entire record in this case, including the exceptions and briefs, and hereby adopts the Trial Examiner's findings, conclusions, and recommendations, except as modified herein.

We agree with the Trial Examiner that Respondent violated Section 8(a)(5) and (1) of the Act in refusing to recognize and bargain with the Union as the representative of a majority of its employees. With respect to the Union's majority status during the critical period, which is challenged by Respondent, the record shows that there were 68 employees in the bargaining unit, exclusive of 4 leadmen who were properly found by the Trial Examiner to be supervisors. The Union thus needed 35 valid authorization cards to demonstrate its majority, and 38 cards were submitted. Respondent specifically challenges the validity of 6 authorization cards. In agreement with the Trial Examiner, we find that the cards signed by Waller, Wick, and Simpson are valid and that the purported withdrawal of Cook's otherwise valid card was ineffective.[1] However, we do not agree with the Trial Examiner's counting of the card signed by White. White is unable to read and he signed his card only because union adherents soliciting him, who did not read the card to him, told him that the purpose of the card was to bring about an election.

The Trial Examiner found it unnecessary to, and did not, pass upon the validity of the card signed by Cullum. This employee signed a card during a union meeting, then crossed out his signature, but finally printed his name on the card which was turned over to a union organizer. Plainly, this was an effective designation of the Union.

Upon the entire record, therefore, it is clear that a majority of the employees within the stipulated bargaining unit had authorized representation by the Union by Jan-

1. As the Union had a majority without counting Cook's card, as hereinafter appears, Member Leedom finds it unnecessary to determine the validity of Cook's card.

uary 11, 1964, on which date the Union made its request for bargaining which was rejected by the Respondent.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order, the Order recommended by the Trial Examiner, and orders that Respondent, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order with the following modifications:

Paragraph 1(a) is amended to read as follows:

"(a) Coercively interrogating its employees regarding their membership in, or activities on behalf of, any labor organization, or taking any affirmative action to determine who among its employees are or are not members of any labor organization, or seeking to induce any of its employees to withdraw from membership in the labor organization by solicitation or promises of benefit, or threatening to deny any of its employees privileges previously enjoyed by them for the purpose of discouraging membership in a labor organization."

Paragraph 1(c) is renumbered paragraph 1(d) and the following is inserted immediately after paragraph 1(b):

"(c) Maintaining and enforcing rules prohibiting employees from engaging in solicitation on company premises during their nonworking time in connection with their concerted activities."

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2. In concluding that Respondent was not motivated by a good-faith doubt of the Union's majority when it refused to bargain, we do not rely, as the Trial Examiner did, in part, upon Respondent's invocation of a long-standing rule against solicitation.

The first indented paragraph of the Appendix is amended to read as follows:

> WE WILL NOT coercively interrogate our employees regarding their membership in, or activities on behalf of, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, or any other labor organization, or take any affirmative action to determine which of our employees are or are not members of any labor organization, or seek to induce any of our employees to withdraw from membership in the above-named, or any other labor organization, by solicitation or promises of benefit, or threaten to deny them privileges previously enjoyed by them for the purpose of discouraging membership in a labor organization.

The Appendix is further amended by inserting after the first indented paragraph, the following paragraphs:

> WE WILL NOT maintain or enforce any rule prohibiting employees from engaging in solicitation on company premises during their nonworking time in connection with any of their concerted activities.
>
> WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the right to self-organization, to form labor organizations, to join or assist INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

The last paragraph of the Appendix is amended to read:

> "All our employees are free to become, remain, or to refrain from becoming or remaining, members of the above-named Union, or any other labor organization."

Dated, Washington, D. C., October 27, 1964

Boyd Leedom, Member
John H. Fanning, Member
Gerald A. Brown, Member
(Seal) National Labor Relations Board

Trial Examiner's Decision

Statement of the Case

This is a proceeding under Section 10(b) of the National Labor Relations Act, as amended, 29 U.S.C., Sec. 151 *et seq.*, herein called the Act.

Upon a charge duly filed on January 31, 1964, by International Association of Machinists, AFL-CIO, herein called the Union, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Regional Director for the Twenty-sixth Region, on March 27, 1964, issued a complaint and notice of hearing, the complaint alleging that Jas. H. Matthews & Co., Respondent herein, had engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act. On March 31, 1964, the Respondent filed an answer to the complaint and on April 20, 1964, filed an amendment to the answer. The answer as amended effectively denies the violations of the Act as alleged in the complaint and sets up certain affirmative defenses.

The case came on to be heard before the undersigned Trial Examiner at Searcy, Arkansas, on April 22 and was closed on April 24, 1964. At the hearing, the General Counsel and the Respondent were represented by counsel, and the Charging Party, the Union, was represented by a Grand Lodge Representative. Each party was afforded full opportunity to call, examine and cross-examine wit-

nesses, to present evidence relevant and material to the issues of the case, to submit proposed findings and conclusions, to argue orally upon the record, and to file briefs. Briefs have been submitted on behalf of the General Counsel and the Respondent, and have been carefully considered. At the hearing, certain amendments to the complaint and corresponding amendments to the answer as amended were allowed.

Upon the entire record, and from my observation of the witnesses, I make the following:

Findings of Fact

I. The business of the Respondent

Respondent is now and has been at all times material herein, a Pennsylvania corporation operating a plant at Searcy, Arkansas, where it is engaged in the manufacture of bronze memorial tablets and plaques.

During the twelve-month period immediately preceding the issuance of the complaint, Respondent, in the course and conduct of its business operations, purchased and received at its Searcy, Arkansas, plant, materials and supplies valued in excess of $50,000 directly from points outside the State of Arkansas. During this same period of time, it manufactured, sold and shipped from its Searcy, Arkansas, plant finished products valued in excess of $50,000 directly to points outside the State of Arkansas.

Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The labor organization involved

The Union is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. The unfair labor practices

The Pleadings

At the outset, it seems expedient to summarize the allegations of the complaint as amended at the hearing and the defense thereto set up by the Respondent. Questions of violation of Section 8(a)(5) and derivative violations of Section 8(a)(1), and other violations of Section 8(a)(1), are involved.

The complaint as amended asserts that all production and maintenance employees of the Respondent at its Searcy plant, excluding office clerical employees, guards and supervisors as defined in the Act, constitute an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act. This the Respondent does not deny, but in admitting it, says that in making such admission Respondent does not bind itself as to the inclusion or exclusion of any particular department, section or individual. The General Counsel alleges that at all times since January 11, 1964,[1] the Union has been designated by a majority and has been and is the exclusive representative for the purposes of collective bargaining of its employees in the described unit. The Respondent disclaims sufficient knowledge and therefore denies these allegations, and says that it on January 11, and at all times thereafter, had reasonable cause to doubt the Union represented its employees and therefore was not then and is not now under a duty to recognize or bargain with the Union. Further answering, the Respondent says that if the Union obtained a sufficient number of authorization cards from Respondent's employees, such cards were obtained by misrepresentation on the part of

1. Unless otherwise specifically noted, all dates hereinafter mentioned are for the year 1964.

the Union and its agents in that employees were told that by signing such card they were merely registering attendance at a union meeting and/or to enable the Union to bring about an NLRB supervised election at the plant; that numerous employees signed cards as a result of such misrepresentation and none of these employees understood they were authorizing the Union to represent them; and in view of such misrepresentation the Union did not in fact represent Respondent's employees on January 11, or at any time pertinent to the complaint. In respect of allegations of the complaint setting out a continuing request of the Union to bargain and the continuing refusal of the Respondent so to do, the Respondent reaffirms its contention that as a matter of law the Union's majority status should be resolved by an election supervised by the Board.

The independent violations of Section 8(a)(1), denied by the Respondent, are that the Respondent, through responsible agents, threatened employees with economic reprisals, withdrawal of normal promotions and raises, discontinuance of a group insurance plan, discontinuance of a profit-sharing plan, and cancellation of proposed plant expansion, if they became or remained members of the Union, or gave any support or assistance to it; surveillance of a meeting place, meeting and union activities of its employees; solicited employees to withdraw from the Union; and since August 1, 1963, has maintained in effect a rule prohibiting employees from soliciting on company property without permission.[2]

2. Respondent issues to each employee at time of hire an *Employees Handbook of Jas. H. Matthews & Co.*, which provides that "Violation of any of the following rules of employee conduct is cause for prompt dismissal or other disciplinary action." Rule 15 reads "soliciting on company property without permission."

The Union Organizing Effort and the Company's Refusal of Immediate Recognition

T. J. Underwood, a coloring department employee since September 1961, testified that after he and some other employees who were interested in union organization had discussed how to go about it, he communicated with Jim Rue, representative of the Union at another location; that Rue met him and employee Joseph W. Shafer, and after discussion Rue set up a meeting with Grand Lodge Representative W. C. Harris for January 6, 1964, at Richard Anderson's Truck Stop on Highway 67, near Searcy.

Present at the January 6 meeting were Harris, Rue, Rue's assistant, Eddie Davenport, and 25 employees of the Respondent. Harris addressed the meeting and explained how the Union could help the employees, and among remarks made, said, "now gentlemen, if you people are interested in the Union and if you want a union, I'm here to help you, but if you are going to turn weak-kneed and when the pressure is put on you, why, it is no use, and you are wasting my time and yours." Underwood said that Harris left the meeting then, and in his absence Rue told the meeting that "if you are interested when Mr. Harris brings back the cards you sign them and if you are not interested, if you are going to weaken under pressure, there is no use in your signing them." Regarding the signing of the authorization cards, Underwood further testified:

. . . Mr. Harris came back in and read over the cards.[3]

At that time he opened the floor and somebody asked him if that meant a vote. He told them no, it didn't mean no vote. Somebody asked how we could get representation and he said "there is two or three different ways you can go about getting representation," said, "you can write the Company a letter and ask them to negotiate with you or you can have an election," and I think that was about the end of it. Then most of the guys started signing the cards, and after the meeting was closed and they filed out to the side. As they would go out the door I was sitting there with Mr. Harris and they would put the cards on the table, and there's where I witnessed the cards.

Harris corroborated the testimony of Underwood in all material respects.

On Friday, January 10, at approximately 4 p.m., a second meeting at Anderson's Truck Stop was held among the employees where the Union was further discussed. During the meeting, and after the meeting and the employees were leaving the premises, Plant Superintendent Morton, Office Manager Russell and Foreman James Landis were present in the main part of the restaurant. The implications of the

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3. The form of blank card reads:

Authorization for Representative

I, the undersigned employee of _____ Clock No. _____
City _____ Dept. _____

hereby authorize the International Association of Machinists or any District or Local Lodge thereof to represent me for purposes of Collective Bargaining and, in my behalf, to negotiate and conclude all agreements as to hours of labor, wages and other conditions of employment. The full power and authority to act for the undersigned as described herein supersedes any power or authority heretofore given to any person or organization to represent me.

_____ _____
(Witness) (Signature of Employee)

Date _____ _____
Please Print Name

[Union Label]

presence of these supervisors at the truck stop in the main dining room, while the Union meeting was being conducted in the private dining room, is hereinafter discussed (p. A54).

There is in evidence by stipulation a list of 72 names appearing on the payroll of January 11, and employed as of January 13. The exhibit shows the clock number, name and job position of each individual. The stipulation is to the effect that these employees constitute the proposed bargaining unit except that the General Counsel contends, contrary to the Respondent, that four men listed—Derrell M. Rongey, Charles Osborne, Larry Harmon and Kenneth Greer—are supervisors, and therefore not to be included within the unit. Counsel further stipulated that if any one of these individuals fall in the supervisory category, then they all do. Underwood identified 19 cards as being signed by individual employees and witnessed by him except for his card at this January 6 meeting, and then handed by him to Harris. Harris witnessed Underwood's card. Two employees (Matthews and Glen Wortham) who were present at the meeting handed him signed cards the following morning. They are included in the count of 19. Employee Shafer testified that he signed a card at this meeting, as did employees Gayler, McKinney, Stephenson and Rhodes. McKinney solicited and obtained the signature of employee Murdaugh. Thirteen other employees identified cards as signed by them variously on January 6, 7, 8, and 11. Thus, on January 11, the Union held 38 authorization cards.

Employee Howard White testified that he signed a card to help employees to get a vote. He said that if there had been a vote, and the Union was successful, he would have quit his job. He signed the card at the home of employee Shafer in the presence of Underwood. He testified they told him that the reason they wanted him to

sign was "to bring the Union in for a vote." White cannot read. He testified that the card was not read to him.

Employee Albert Simpson attended the January 6 or 13 meeting. According to him, the only reason given to him by Grand Lodge Representative Harris at the time was "He just said that if we signed the card we could get a vote in the plant, if they had a majority." Simpson did not recall whether Harris had read the card to the whole group.

Employee LeRoy Wick testified that he attended a union meeting and heard Harris state "that if we signed these cards that they were for a vote, for the personnel of the plant to be able to vote for or against the Union."

Employer David Waller said that Simpson, at the plant, asked him to sign a card, telling him that "it was just to get them down there, so they could bring it to a vote."

Employee W. L. Hester testified that he attended a meeting, signed a card, and hear Harris say the purpose of signing a card was "to bring about a vote within the Company."

Employee Carl R. Cook wrote an undated note, as follows:

> I do not want to be a member in the I.A. of M. Union and I have signed a card. I would like to have the card sent back to me.
>
> I am working for Jas. H. Matthews Co. at Searcy.

He said he gave the note to someone in the plant to mail for him, he did not remember who. The envelope, post marked Searcy, January 22, 1964, addressed by another's hand, was sent certified mail, return receipt requested to Cook's address, to Harris. Cook said that Gayler asked

him to sign the card, and that "I took it and was reading it, and he said the purpose of the card, to begin with, was to get the Union in for a vote only."

Under date of January 11, Harris, on behalf of the Union, notified the Respondent in writing that the Union had been requested "by your employees" to represent them in collective bargaining; requested a meeting to "discuss, negotiate, and enter into agreement with us the terms and conditions of employment" of employees in a described unit; suggesting dates or requesting alternative dates for a meeting "for the purpose of establishing our showing of representative of your employees." A preference for "the selection of a neutral party to be present and check our representation request against your payroll" was expressed.

On January 14, the Respondent by its office manager, James E. Russell, acknowledged Harris' letter and said:

> Please be advised that we will recognize and bargain with your union, in the event your union is certified by the National Labor Relations Board as the exclusive bargaining representative for our production and maintenance employees, in an appropriate unit at our Searcy, Arkansas plant, after an election conducted by the National Labor Relations Board by secret ballot.

By a letter to the Respondent, dated February 3, Harris stated he was "ready and willing to prove majority status," and further stated a continuing demand for recognition and bargaining. This letter was answered by counsel for the Respondent on February 13, which reiterated that "The Company . . . will not recognize and bargain with your Union" unless certified by the Board after an election conducted by the Board, and further:

> We reaffirm the Company's position . . . since the Company has reasonable doubt that your union represents a majority of its production and mainte-

nance employees. We feel that the most satisfactory method of resolving the question of your Union's majority status is through an election by secret ballot supervised by the National Labor Relations Board. In this manner we feel that the overall purposes of the National Labor Relations Act will be satisfied, and the employees will be allowed to make their choice accordingly.

If the cards of White, Simpson, Wick, Waller and Hester are disregarded, the number of valid cards is reduced to 32 as of January 11. Then, if leadmen D. M. Rongey, C. Osborne, L. Harmon and J. K. Greer are to be considered as nonsupervisors and therefore within the unit, and none of these men having signed a card, the facts lend color to the Respondent's claim that it lawfully could refuse, because of good-faith doubt, to accord recognition to the Union.

Company and Searcy Plant Organization

James H. Matthews & Co., the Respondent, is comprised of three divisions—the Industrial Marking Products Division, Box Die Division, and the Bronze Division. In the Bronze Division are three plants, one located in Minton, Ontario, Canada, another in Pittsburgh, Pennsylvania, and the one located at Searcy, Arkansas.

Roy Randles, stationed in Pittsburgh, is general superintendent of the bronze plants of the Company at its three locations. At Searcy, William M. Morton is plant superintendent. Under him, James R. Landis is general foreman of factory operations. Morton personally supervises the foundry area. Under Morton other than Landis, is E. L. McCullock who directs maintenance. James E. Russell is office manager and as such is in charge of the office, directs the office and the purchasing and is in charge per-

sonnel in his department. Morton reports directly to Randles, as does Russell.

Some 35 employees are employed in the foundry and 37 employees work in the factory.

In the factory there is a pattern set-up department, a tooling department, a coloring department and a shipping department. In the pattern set-up department 12 employees are headed by a leadman, Derrell M. Rongey. The tooling department has a leadman, Charles Osborne. The leadman in the coloring department is Larry Harmon. Kenneth Greer is leadman in the shipping department. Other than the leadmen, eleven employees are in the tooling department, six in the coloring department, and five in the shipping department.

The work layout is made upon determination of a daily work schedule based on the orders received each day. After receipt of orders and after production planning, a pattern is set up in that department, where the appropriate name that goes on the design called for by the order is selected, and letters glued on by a process of shellac and wax, according to proper process. After the letters are placed on the pattern, the pattern is forwarded to the foundry and the order for that pattern, or memorial, is forwarded to the rough inspection table where such order is filed together with others in alphabetical order. When the casting is received, usually the following day, it is forwarded to the tooling department where bosses are drilled on the back of the memorial for the insertion of lugs. After the drilling of the back and tape made for canisters, the memorial is goosenecked in a vase opening and all imperfections are removed. The memorial then is cleaned by a method of sand brassing; it then goes through an automatic coloring booth where the memorial is colored; and

the memorial is then highlighted by a process of buffing with certain compounds used to highlight the letters and border ornamentation. Another automatic operation then occurs when a memorial is treated for preheat and protective finish. It then is baked and forwarded to final inspection where the memorial is inspected and then placed in a carton for shipment.

Status of Leadmen as Supervisors

The questions as to whether factory leadmen are supervisors must be determined in order to find their proper place either in or out of the bargaining unit; and whether certain Section 8(a)(1) alleged violations are attributable to one or more leadmen and therefore binding on the Respondent.

According to Landis, he is the one completely responsible for the laying out or assignment of work according to orders and work schedules. The leadmen under him are more highly skilled and receive higher hourly rates of pay than other employees in their respective factory departments, although the rates of pay of other employees may vary according to their respective skills and length of service. A leadman does not have the right to hire or fire, nor does he have the power to effectively recommend hiring or firing. He oversees the work done in his department according to specific instructions given to him by Landis. Certain instances were cited where a leadman, under prior authority delegated to him by Landis, has and may shift employees from one job to another on a day to day basis or perhaps during the course of a week, depending on work schedules. In this connection, Landis testified:

> Q. (By Mr. Clark) All right, sir. Take Charles Osborne, for example, does he change employees from one job to another during the day?

A. He could. On several occasions, like I stated, I have told him that he would have a part day in memorials and the rest of the day he would have to run vases. Then, in a case like this, naturally, when he ran out of memorials, the fellows that I have told him to put on vases will start running memorials or the fellows that I have told him to put on memorials will start running vases.

Landis further testified in response to a question as to whether he knew of any occasion that Osborne had given anyone time off on his own accord, replied that he knew that there had been occasions when he had told the group leaders (leadmen) that they were able to give a man time off on this particular day because production was slow and that at other times leadmen, with his permission, had let men off to take time to hunt or to bank or perhaps for other personal reasons.

On occasion, men employed in the factory may be assigned to work in the foundry. When this occurs, Landis said, he first is told by Morton that the latter needs extra hands, then "I go to these departments and tell the men to give me someone . . . I tell the supervisors to give me five or six men and which ones to give me." He also is the one who orders their return to their original assignment after work in the foundry. In addition to the instructions issued by him to the leadmen, Landis also issues instructions directly to men in the several departments under his direct supervision. He estimated that he spent 90 percent of his time in his departments of the factory throughout a day.

Charles Osborne described his job as that of leadman in the tooling department; that there were nine employees employed in January and eleven in April in that department; and described the functions of his department:

> First of all, there are drill presses, as the work comes through it goes through drill presses, and there is a gooseneck table, and then there is chasing tables and a sandblaster. That is the last machine in the department.

Osborne testified that he spent about 75 percent of his time running the sandblasting machine and the other 25 percent he estimated was in special work such as stamping. He said he did not have the authority to hire anybody or fire anybody in that department or, so far as he knew, to effectively recommend the hiring and firing of anybody because that situation had never occurred. He said further that Landis was his immediate superior, was the one who had authority to give individuals time off in his department, and that he had never disciplined an employee.

Larry Harmon, in the coloring department, leads seven men. He described the function of his department as brassing, coloring, lacquering and buffing, and mixing protective finish. The coloring machine is used to color castings; a pretreat machine is used to apply protective finish. Harmon described, briefly, the operations in that department:

> Well, it comes out of the sandblaster, which is the tooling department, and it runs from there into the coloring machine, a coloring machine, on a conveyor, and it goes from there on a conveyor around the buffing station and then into the protective finish booth, later it goes on a conveyor from there to the ovens where they are baked, where the castings are

baked, where the protective finish is baked on the molds.[4]

Harmon said he did not have the authority to transfer men from one work station to another without consulting with Landis; that he has no authority to hire or fire; that he cannot grant time off to other employees without the consent of Landis or Morton.

Kenneth Greer, referred to as a leadman in the pleadings and in the stipulation mentioned above, is in charge of the shipping department at the Searcy plant. According to his testimony he has been employed in the shipping department for about 2 years together with four other employees, the department being engaged in packaging and routing completed orders for shipment. He testified that he received his orders from Landis, that he did not assign the other employees directly to the work performed by them but did assign them upon instruction from Landis. He said that on occasion when another man employed in the shipping department received instructions from him to perform work in the factory or in the foundry, he was so instructed by Landis or by Morton. He has the use of a desk in a segregated enclosure, frequently mentioned in

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4. Landis, estimating the time spent by Harmon performing the same duties as the other men in his department perform, said it amounted to about 75 percent; and the other part of his time would be mixing top coat and materials for the machines. Landis described the duties of Harmon, some of the same duties being performed by other men in his department, as follows:

> He mixes color for the coloring of our plaques as far as keeping machines full of lacquer and top coating and pretreatment, and he runs memorials through the automatic coloring machine, through the pre-treat machines, through the coloring machines and through the oven, and places them ready for final inspection on the storage rack, and he colors our chains and our P B screws and the accessories for the memorial and when a job is done there, then he will go on the buffing table and buff memorials with the other men.

the testimony of several witnesses, the desk being used by many persons other than Greer.[5]

Further, in support of the contention of the General Counsel that Rongey, Osborne, Harmon and Greer are supervisors, is testimony of Underwood who said that when he first was employed he was interviewed by Morton, who took him to where Harmon was working and introduced Harmon as his supervisor. It is emphasized that Morton took Underwood directly to Harmon and not to Landis. Eugene Rhodes testified that Greer was made a supervisor after about 6 months' employment, at which time Landis informed all the shipping department employees that Greer

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5. Landis was more specific than Greer in describing the latter's duties. Landis described him as a routing clerk, routing orders for shipment. Landis said that was the main function assumed by Greer, other than helping other employees at their job station and filling in for an employee who might be assigned to a different job for a day. In answer to a question as to the function of the shipping department, Landis testified:

> First of all, our inspector releases the memorial as a good casting and we have one employee that gets a box, the appropriate size box for the memorial, and puts the appropriate lug in the box. The memorial is then placed on top of the box with the lugs in it. The box is folded. The banding operator gets bands the material in the box. He bands the box to the memorial. Then, all our orders have stencil numbers on them, customer account numbers, we call them, and we have stencils running from 1 through 3,700 and in this series one of these stencils will match the order that goes with that memorial. The stencil operator stencils the box to the destination that it's going. He writes the weight on the order, how much the casting weighs, and puts our order number and stencil number on the end of the box. Then the order is taken in.

Landis further testified that employee Rhodes is in charge of the banding operation, LeRoy Wick is in charge of boxes, and John D. Laden is in charge of the stencil rack. According to Landis, Greer at times filled in or does fill in each one of these jobs. However, as noted, Landis testified that the primary duty of Greer is to route an order according to the design and weight schedule set up for Greer by Landis for the shipping department, according to weights, and whether it would go by truck or railway express. The desk referred to as being Greer's office is said by Landis to be used for a lunch counter, for the segregating of orders, for storage, for the placing of timecards and so on—"it is more or less a storage desk."

"would be in charge of the shpping department." R. C. Quattlebaum, David Waller, Lonnie English and Jerry Feren each testified that either Rongey, Osborne, Harmon or Greer was his supervisor. The General Counsel says that this "ostensible authority," although not alone sufficient to establish the supervisory authority and status of these four employees, is indicative of supervisory status, and that it should be considered in determining the status of the four employees in question.

To support the contention that the four men referred to exercise the use of independent judgment in the direction of the work of employees in their several departments, the General Counsel relies on the testimony of Underwood that he did any one of the several jobs within the coloring department; that his daily work was directed by Harmon; that Harmon told him what to do every day and whenever he was transferred from one job to another, Harmon always was the one who transferred him. Reference is also made to the testimony of Underwood that on occasion he had been transferred temporarily to do work in other departments and that Harmon always was the one who transferred and directed him.

Underwood testified that Harmon's main duties are to inspect the work of the employees in his department and to walk around the conveyers and to watch the work of employees therein. He also said that Harmon on several occasions criticized his work when not properly performed; that Harmon had told him he would change his job if he could not perform the work right, and that Harmon also has criticized the work of other employees within the department. Rhodes said that Greer generally worked on the line with the employees in his department when the employees get behind or are rushed, but, if the department

is not too busy, or the employees are not in too big a rush, Greer will "generally just stand around, inspect, and watch them work."

Rhodes testified that the daily work of the employees in the shipping department was directed by Greer, that Greer assigned employees daily to their various jobs, after Landis first had assigned the jobs; but that since Greer was made supervisor he was always the one who effectuated the assignment of an employee in the shipping department to do work in another department. In support of the same argument, it is pointed out that Quattlebaum, Waller, English and Feren each testified that his supervisor would assign him daily work and if he was transferred from job to job his supervisor would make the assignment.

The testimony of employee Carlos Purkiss would indicate that Harmon, contrary to his testimony, did have the authority to effectively recommend the discipline of employees. Purkiss, an employee in the coloring department, testified that Harmon is his superior; that on one particular occasion Harmon had criticized his work and told him that he was not doing as much work as another man in the department and that he (Purkiss) resented the criticism, whereupon Harmon took him into Landis' office and told Landis that Purkiss had been insubordinate, then Landis issued Purkiss a disciplinary slip ("Notice of disciplinary action"), and told Purkiss that two or three of those slips would result in his immediate discharge. Underwood testified that he saw and heard Harmon reprimand Purkiss on this particular occasion.

Underwood and Rhodes each testified that he on several occasions in the past had requested and received permission from Harmon or from Greer to leave early in order to attend to personal business, and in each case permission was granted without either Harmon or Greer consulting with Landis.

As proof of the supervisory status of Rongey, Osborne, Harmon and Greer, evidence was adduced showing that meetings were conducted by Landis, with these four men present, at frequent intervals in the plant superintendent's office and on occasion Plant Superintendent Morton also attended. According to Landis, it is usual practice for him to meet with the leadmen either in the morning or on a previous afternoon to inform them that he has orders for a certain number of castings coming out of the foundry made on the previous day and that there will be a full day's run on castings, or, that "he will have to split his day and run part of the day in casting" and the rest of the day on other work. After explanation of the work to be done as laid out by Landis, according to his testimony, the leadman places the work to be done according to the information furnished to them by Landis at the so-called production meeting.

Uncontradicted upon the record is the fact that during the summer of 1963, Landis together with these four men, went to Pittsburgh at the expense of the Company to afford them special training. According to the testimony of Underwood, immediately before this trip was to take place, Morton told an employee who had asked if he could make the trip that it was only for supervisors. Accordingly, it is asserted by the General Counsel the production meetings, together with the training given to the individuals, demonstrates their supervisory status.

Rongey, Osborne and Harmon are paid at the rate of $1.90 an hour and Greer is paid at the rate of $1.80 per hour. Next highest paid employee in Rongey's department receives $1.50; the next highest paid employee in Osborne's department makes $1.70 an hour and the next highest paid employee in Harmon's department makes approximately $1.70 an hour. The next highest paid employee in Greer's

department makes $1.69 an hour. These four men have special parking privileges with the high ranking supervisors and do not park on the same lot as other lower paid employees do. Finally, it is contended on behalf of the General Counsel, if Rongey, Osborne, Harmon and Greer are not found to be supervisors, there would be only two supervisors over 72 production workers, a disproportionate ratio.

Darrell M. Rongey, leadman in the setup department, did not testify at the hearing.

It seems to me it has been conclusively demonstrated that the four employees in question do in fact fall under criteria which when applied affirmatively shows their supervisory status, namely:—their ostensible authority as recognized by other employees; use of independent judgment in the direction of work of other employees; in one case the effective recommendation for discipline of employee Purkiss; the use of authority to grant time off; and the comparatively substantial pay differential between each leadman and the other employees in his department. Further, a disproportion of supervisors to supervised has been established, should only Morton and Landis be accepted as supervisors over 72 men in four departments who engage in the production work above described. The attendance of the leadmen at regular production meetings is also significant. The exercise of the authority vested in Respondent's leadmen seems to me to be not of a merely routine nature, but does require the use of independent judgment so as to mean they are supervisors within the meaning of Section 2(11) of the Act. Their exercise of authority is not limited to mere ministerial acts. I therefore find Harmon, Osborne, Greer and Rongey to be supervisors. *Minnotte Mfg. Corp.*, 131 NLRB 684, 688; *Bama Co.*, 145 NLRB No. 112; *Lyon, Inc.*, 145 NLRB No. 3; *Re-*

search Designing Service, 141 NLRB 211, 213; *Victory Grocery Co.,* 129 NLRB 1415, 1416; *Monarch Rubber Co.,* 129 NLRB 482, 483.

Interrogation; Incidental Threats

During the times covered by union organizational activity as described above, the Respondent, through Division Superintendent Randles, Plant Superintendent Morton, Office Manager Russell and leadman Harmon, talked to many employees concerning their interest in the Union. These conversations, at various times and places, indicate an apparent intent to stay within the bounds of permissible inquiry, but in full effect constitute interference at least, and real intent to coerce and intimidate employees in their concerted activities for the purpose of collective bargaining.

Larry Harmon, one of the leadmen, is alleged to have interrogated employees on January 7 and January 28; William Morton, plant superintendent, is said to have interrogated employees on January 8 and January 17; Roy Randles, general superintendent of the Company's Bronze Division, is said to have engaged in interrogation on January 20, and James Russell, the office manager, on January 28.

Threats of economic reprisals made directly to employees are said to have been made by Randles on January 20, Morton on February 6, Harmon on January 7, 9 and 28, Osborne on January 9, and Russell on January 8.

According to employee T. J. Underwood, Harmon, on the morning of January 7, the day after the first union meeting, approached Underwood while the latter was at work and asked, "How did the meeting go last night?"; and again, on the same day, Harmon spoke to Underwood

and asked, "T. J., who is pushing the Union?" Underwood said that among other things Harmon said to him were, "T. J., they must be paying you good to push the Union, and I said, like hell; they ain't paying me a damn thing. He said, you are not that much of a crusader on your own." Employee Cullum testified he attended the first union meeting on January 6 and on the following morning while he was having a soft drink, Morton asked him if he had been to a meeting the night before. Cullum said that he replied in the affirmative and that Morton replied, "Well, you've got a right to go to any meeting that you want to."

Gayler, an employee, testified that on about January 8, while he was at a soft drink machine, he was approached by Morton who asked him what he thought about the Union. Gayler replied that he thought it would "help the working class of people."

Employee Shafer testified that during the month of January, Morton asked him what he thought he would gain by or through the Union and that he, Shafer, replied, "Well, we would have more security if we could get a contract put on paper, where it wouldn't be by word, . . ." Shafer also testified that about the same time, approximately January 15, Harmon spoke to him at the drinking fountain and remarked, "If we get a union in here, we won't get this vase department put in our plant." Shortly thereafter, according to Shafer, Randles approached him and asked him what he thought he would gain "by getting a union in here"; that Randles further said, "I do not know whether I can talk to you or not," and that he (Shafer) replied, "Well, I'm standing here, you just go ahead and talk all you want to." And he (Randles) said, "I've been planning on sending a T-lug machine down here, but if we get the

Union in here, there isn't any need in sending it down here because if you guys go on a strike, I wouldn't have any place to make my T-lugs and furnish the other plants," and then, according to Shafer, Randles said, "I wish you would reconsider that about the Union," to which Shafer replied, "Well, I've already got my mind made up." Randles again, Shafer said, repeated his request that "You would reconsider it again now, about the Union." And that Shafer replied, "Well, I've already got my mind made up."

Employee McKinney said that he was approached by Randles around the middle of the month of January at his work station in the foundry and was asked how he felt about the Union. During the course of this conversation, McKinney said that Randles remarked, "Well, you ought to make sure that's what you want before you are for it," to which Shafer said "Yes" and Randles then said, "Well, that is a person's privilege."

Eugene Rhodes, an employee in the shipping department, said that he, while at work, was approached by Randles and they engaged in a conversation for about an hour; that during that conversation the Union was discussed and Randles asked him how he felt about the Union; that he told Randles that he was for the Union; that Randles admonished him that he, Randles, was not asking him to tell him anything about the Union but did ask him the reason for his wanting a union "and I told him some of those reasons." Rhodes testified further that sometime during the last part of January on the day after a union meeting, Russell approached him while he was at work and asked him if he had learned anything at the union meeting the night before; Rhodes said he told Russell that he had not learned anything that he did not know before; that Russell asked him what it was he had known before

and further asked if the Union had guaranteed him more money or seniority rights.

With respect to further interrogation by Randles, Underwood testified that when Randles was on one of his visits to the plant at about January 20, Randles talked to him at his work station or near there for about 2 hours. Underwood testified:

> He came up to me and said, T. J., how are you, and shook hands with me and says, I hear there's a little trouble going on here. I said, yes, sir, there is a little. So, we walked over to out of the area, so we could smoke and he said, let's go over here, where we can smoke. So, we went over there, and he said you might sue my pants off, and I didn't say anything and he said, if I could just find out or get somebody to talk to me and find out what kind of trouble is going on, I could get to the bottom of this, but everybody seems afraid to talk to me, and he said, if I could just get anybody, even if it meant taking to get them . . . even if I had to get them in a car and take them 40 or 50 miles. . . .

General Superintendent Randles arrived in Searcy on or about January 16. He had made a previous visit in November 1963. He said that the purpose of that trip was for the purpose of increasing the wages of the employees, distributing that portion of profits under the profit-sharing plan to the employees, and to consider or grant vacation benefits, and a military service bonus. All these were announced during the course of his November visit. At that time, according to his custom, he interviewed or talked or visited with as many employees in the plant as he could individually and then called them, by department, into his office and distributed the profit-sharing checks to them. In speaking to the employees individually, he inquired as to how they were getting along, whether they had any complaints and discussed plant activities in general terms.

Randles testified that his visit in January, following the November visit, was because he had been advised while he was in Portland, Oregon, of certain developments in the Searcy plant and so scheduled his return trip from Portland for a stop at Searcy before returning to his Pittsburgh office. While at Portland, he said, he had received a telephone call from Morton, who read to him the letter received from the Union asking for recognition. Randles then communicated with the personnel department at Pittsburgh, and subsequently arrived at Searcy on about January 15 or 16. Upon his arrival at Searcy, he consulted with Morton and Russell, and then, "in my usual procedure" he started talking to employees individually in the plant to determine what he described as "the trouble." He received several complaints, including, for example, the smoke fumes in the foundry; answered questions concerning the Arkansas right-to-work law; and, according to him, was told about the union activity then going on in the plant. In answer to a question on direct examination, whether he had come to any conclusion as to whether the employees were for or against union organization, he replied:

> I found both. The people that I talked to, I believe the majority was against it. I believe the majority was against it, because it was very outspoken. It was no secret. An employee would tell you, "I don't want to have anything to do with it," or "I might vote for the Union but I won't pay dues," many remarks like that.

He testified that there was a great deal of discussion about a union election, and that he formed an opinion in his own mind that the employees were more against union organization than they were for it.

The testimony of the witnesses, I believe, demonstrates that interrogation reported by the several witnesses called by the General Counsel did in fact take place. As shown,

the testimony reflects, and is not firmly denied, that Underwood, Shafer, Gayler and McKinney were asked what they thought about the Union and that there was considerable discussion in the plant concerning the activities of Underwood as a union organizer, such discussions being well known to the Company either through interrogation by its representatives or from overhearing conversations or discussions among the employees while they were at work. Superintendent Randles did not evade the fact that he talked to as many individuals as he could during his January visit. The interrogation of Rhodes by Russell, and Russell's further discussions with employees concerning the Union and the knowledge by him of some of their views in regard thereto, is clearly stated on the record.

General Counsel points out, I believe correctly, that most of the interrogation of employees by agents of Respondent occurred after the Respondent had refused to recognize the Union and, further, it was never explained to the employees that the purpose of the interrogation was for a basis of determining whether or not the Union actually did represent a majority of the employees in the Searcy plant.[6]

The Respondent takes the position that the questioning of employees, as reflected by the record, adds up to the fact that Randles was attempting to determine whether the Union in fact represented a majority of Respondent's employees; that this type of interrogation is permissible under the circumstances, and relies on *Briggs IGA Foodliner*, 146 NLRB 52, and *Blue Flash Express, Inc.*, 119 NLRB 591. Here, however, the circumstances are different. In *Briggs IGA Foodliner*, the Board expressly found that:

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6. Randles testified that he had heard rumors during the course of his inquiries that the Union held from 14 up to 26 authorization cards from employees. This statement, to me, is indicative of a close inquiry from the employees themselves as to their interest in the Union.

> . . . On the basis of all the evidence, particularly the facts that there is no dispute as to what the employees told Briggs about the circumstances of their signing the cards, that the Respondent urged the Union to seek an election, that the Respondent petitioned for an election when the Union failed to do so, and that the Respondent committed no contemporaneous unfair labor practices and demonstrated no union animus, that the Respondent did have a good-faith doubt as to the Union's representative status.

In *Blue Flash Express, Inc.*, the Board, referring to the findings of the Trial Examiner in respect to "the demeanor of the witnesses . . . to detract from their trustworthiness and that there was no inconsistency in the testimony of any witness which would enable the Trial Examiner to determine who was telling the truth," held:

> We find nothing improper in the manner in which the Trial Examiner resolved this issue. The burden of proof is upon the General Counsel. When, as in this case, the Trial Examiner is not persuaded by the testimony of the General Counsel's witnesses that threats and promises were made to them by the Respondent, the General Counsel has failed to meet that burden of proof. As an examination of the record discloses no other basis for reversing the Trial Examiner, we find that the allegation that the Respondent violated the Act by making threats of reprisals or promises of benefit to its employees has not been sustained.

In the instant case, opposite to the finding of the Trial Examiner in *Blue Flash Express,* I am persuaded by the testimony of the General Counsel's witnesses that threats and promises were made to them in the manner described by them and at the times mentioned by them, as reflected by the record herein. *Blue Flash Express* is not dispositive of the instant case and the principles set forth therein, applicable hereto, are opposed to the position of the Respondent. (91 NLRB 593-595.)

The facts here reflect that the interrogations being contemporaneous or nearly contemporaneous with threats, may reasonably be inferred to have tended to interfere with the rights of employees under Section 7 of the Act and violative of Section 8(a)(1).

Underwood testified to several incidents which he interpreted to mean that the Respondent was considering curtailing the proposed plant expansion should the employees designate the Union as their representative. Underwood said that on January 7, he was told by Harmon, "You had better drop it or it will mess you up in your department" and a little later Harmon said, "If you don't drop it, it is going to mess you up in your department and you will have no more raises or promotions, we won't have no more promotions or raises for you." Again, Underwood said, that Harmon approached him in the coloring department and told him that if any man in that department "goes union" he (Harmon) would make it difficult for the employee.

On January 9, according to Underwood, Russell told him while he was at work that plant expansion might be canceled. Underwood testified:

> He came over to me to get me to sign a slip to get my pension plan, . . . I was canceling mine, and he started and he said, T. J., I hope you know what you're doing, and I said, I think I do, Rusty, and he said, well, I guess you know, as of Monday morning, that this plant has ceased to grow and at that time, Larry Harmon came up again and butted into the conversation and he said, yes, and not only that, but you will lose all your insurance, profit-sharing, and all of your company benefits. He said, you see those stakes? You know those stakes were back of the foundry and they were going to expand to those and now they won't expand them.

It will be recalled that Underwood testified to a conversation with Randles, a part of which he interpreted to

mean that Randles threatened to cancel plant expansion because of union activity. According to Underwood, he was told by Randles that the Company had intended to move a vase machine into the Searcy factory, but since "all of this trouble has come up, he didn't think he would." The following day, again according to Underwood, Randles told him that he had intended to install a T-lug machine, that he "didn't want to get his eggs all in one basket, . . ." Although the Union was not specifically mentioned in these conversations between Underwood and Randles, Randles, Underwood thought, clearly meant that the proposed changes might not be made because of the entrance of the Union onto the Searcy scene.

Employee Shafer testified to two conversations, one with Randles when Randles told him he had been planning on sending a T-lug machine into the Searcy factory "but if we got the Union in here there isn't any need in sending it down here, because if you guys go on strike, I wouldn't have any place to make my T-lugs and furnish the other plants . . ." and asked Shafer to reconsider his decision to favor the Union. Randles testified concerning the conversations reported to have been between him and Underwood and Shafer and as nearly as I can determine he conceded a discussion concerning the installation of a T-lug machine into the Searcy plant; said that part of the equipment was there when he arrived in January, the other part being on order; denied that he mentioned putting all of his eggs into one basket, but did concede that he told Underwood that a work stoppage at any one plant would shut the other two plants down, especially if the T-lug operation in Pittsburgh was transferred to Searcy. Randles freely conceded that he questioned not only Underwood and Shafer concerning union activities, but also talked to other employees about the Union.

Harmon conceded that he told Underwood that if he "didn't quit messing around with the Union" somebody might be discharged for huddling up in groups and talking and slowing down production. Harmon said that everyone in the plant knew that Underwood was for the Union and that a good many people joked with him about it; that the statement made to Harmon in the form of a question as to who was paying him for his union activities because he was not that much of a crusader, was made in a joking manner; and Harmon did admit that he asked Underwood how the meeting had gone the night before and also said, "You had better drop this . . . or it will mess you up in your department." Joking or not, it is plainly apparent that suggestions were made to Underwood, Shafer and other employees that it might not go too well for them if they continued their interest in union activities.

Another threat against union activity reported is an incident testified to by employee Stephenson, to the effect that in the first week of February, Morton told him while he was at work:

> He came back to my station where I was working and he had an insurance check in his hand that I had filed for earlier and he showed me this insurance check and he said, this is good insurance, isn't it, and I said, yes, it is, about as good as I ever had, and he said, do you think the union can get you this kind of insurance, and I said, I don't know about that, and I had a union button that they had given us to wear 2 or 3 days earlier and he put his hand on this union button and flipped it and said fooling with the union is going to cause you to lose that insurance.

It seems to me that the threat by Russell to cancel plant expansion, as related by Underwood, and Harmon's contemporaneous threat that company benefits might be

withdrawn is serious enough to warrant discounting of the company defense that remarks concerning the threat of company expansion, the loss of the profit-sharing plan and other benefits and so on was enough to indicate to the employees that, joking or not, the company was serious in passing along these implied or inferential threats in the hope that it would discourage union activity. Although Randles partly denied certain statements attributed to him, it is, as the General Counsel contends, clear that he was the one who injected the subject of T-lugs, vases, work stoppages and plant expansion into the conversatioons admittedly held with a number of the employees, including Underwood and Shafer, and admitted portions of the conversations apparently not adversely affecting the Respondent. As to the conversation between Morton and Stephenson where Morton is said to have mentioned the insurance plan, Morton denies making the statements attributed to him by Stephenson, and yet at the same time he does say that he approached Stephenson and gave him the check. In regard to these various and several conversations, I am inclined to and do credit the testimony of Underwood, Shafer and Stephenson, having in mind the testimony of Morton, Randles, Harmon and Osborne, because I think that the circumstances and the explanations of the circumstances as given by the Respondent's witnesses are not in accord with the atmosphere at the time these conversations took place. It seems to me much more likely that these conversations, initiated by representatives of the Respondent, were intended to and did have the effect of demonstrating to the employees that the Respondent was opposed to their concerted activities on behalf of the Union and that if they continued in such activities they might be penalized.

On behalf of the Respondent, it is argued that Underwood admitted that Randles at no time actually questioned him about his union activities; and I am urged to pay particular attention to the testimony of Randles explaining his practice to make periodic trips to the various plants and that his trip in January was a scheduled trip; that during his visits it is his custom to talk to all employees at their work stations or wherever he meets them; that he reported his conversation with Underwood, although denying making any threats or promises; that that is true (in regard to Shafer's testimony) that with respect to the T-lugs, Randles pointed out that some of the machinery had already arrived in Searcy at the time of his January visit; and that he told both of these employees to "consider all of the facts and vote as they saw fit."

The question whether or not Randles, in his effort to determine the extent of union organization in the Searcy plant, exceeded the bounds permitted by the Act, I think must be resolved on the basis not only of Randles' purpose of inquiry, but on the basis, too, of such other inferences as should be drawn from the remarks of Morton and those of the leadmen. In whole context, I find that the interrogation and the implied threats of removal of benefits were and are in violation of Section 8(a)(1) of the Act.

Surveillance

The union meeting held at Anderson's Truck Stop on Highway 67, near Searcy, on January 10, has been referred to above and, it will be recalled, that at that meeting, employees of the Respondent signed a number of Union authorization cards after being addressed by Grand Lodge Representative Harris and others, and that Underwood as a leader of the employee union movement, witnessed

the signatures on a number of cards signed there by employees. Russell, Morton and Landis, supervisors employed by the Respondent, were sitting outside in the main part of the restaurant while the union meeting was being conducted in a separate private dining room. These three men apparently were there all during the time of the meeting and after the time the meeting ended.

Employees Underwood, Gayler, McKinney, Rhodes, Edwards, Wilson and Swain all testified that they observed the three supervisors at a table and that Russell had in his hand a clipboard, or some kind of paper, as the employees left the dining room on their way out of the union meeting.

I have trouble reconciling the testimony of Morton, Russell and Landis as to how they happened to stop by Anderson's truck stop on a day which was, according to Russell, "the first day that I had any idea that we were having any activity at the plant, any union activity. . . ." According to Russell, he told Morton on Morton's suggestion that they stop and have a drink, that he had a part of a bottle of Canadian Club left in his truck and suggested that Morton accompany him after work and they would have a drink or two, explaining that he and Morton usually go out once or twice a week to have a drink and on this particular evening they first went out to a farm owned by Russell to feed a horse he had stabled there.

Morton said that the reason he happened to be at Anderson's was that immediately after work, he and Russell, riding in a truck owned by the latter, did stop by Russell's farm and fed Russell's horse; that they then left Russell's farm on their way to the Elks Lodge on the same highway on which Anderson's truck stop is located and stopped by Anderson's to get setups and there to have

a drink. On cross-examination, the testimony of Morton is a little bit different in that he said they went from the plant to feed the horse, and from the horse to the Elks Lodge, but because the Elks Lodge was closed, they went on to Anderson's. Supplementing or adding to the testimony of Morton on this point, Russell said that after feeding the horse they took a back road toward the Elks Club and on the way decided to stop at Andersons's to get their setups for their drinks.

Landis said that his reason for being present at Anderson's Truck Stop was this:

> Our Elks Lodge which I helped to get enforced into the county, we were being evacuated from our home lodge. We used to be located at the Auto Auction Lodge here on Highway 67 bypass, and we had been notified that we were to be evacuated, and one of the members of the lodge had asked me to check on the Red Barn, which I did, and I happened to see a truck that I knew. So, I stopped and talked to Mr. Russell and Mr. Morton.

I gather further from the testimony of Landis that ordinarily he would not pass Anderson's Truck Stop when leaving the Searcy plant at the end of the day.

The covergence of the three top supervisors of the Searcy plant on this particular day when the employees were most deeply interested in union organization, seems, to say the least, more than fortuitous. It could be coincidence, but I doubt it.

To return of the subject of a so-called clipboard that Russell is supposed to have had before him, he denied categorically that he had a clipboard with a paper on it, anything resembling a clipboard such as a briefcase, or any other paper or document near at hand when the em-

ployees came out of the back dining room on their way out from the union meeting. He said the only thing he had with him was about a half bottle of Canadian Club with the setups on the table. If he is to be credited, I gain the impression that the bottle was kept somewhat out of sight from the top of the table.

Russell and Morton denied categorically that Russell had either a clipboard or paper before him. Richard Anderson, owner of the truck stop, was called as a witness for the Respondent. Anderson said that he did not see Russell with a clipboard although he was, at the time Russell, Morton and Landis were there, and the union meeting was in progress, in and out of the main restaurant taking care of customers, so that he said he could not positively testify that Russell did not have anything before him other than the setups for a drink. R. H. Miles, a witness called by the Respondent, testified that he visited with the Respondent's supervisors at their table and that he did not observe either a clipboard or any other writing material in the possession of Russell at the time he sat at their table. Miles is not connected with the Company. Another witness, N. B. Robbins, an employee of Matthews, said that he had stopped by the table where Russell and Morton and Landis were sitting and did not observe that they or any one of them had a clipboard. Landis did not testify on the point. He said he visited with Russell and Landis for 15 or 20 minutes; was not there when the union meeting broke up and the employees started leaving the private dining room, so that his testimony here is not of much value except for the fact that he "happened to see a truck that he knew," and therefore stopped and talked to Russell and Morton.

It seems to me that the record clearly discloses that Landis said he approached Anderson's truck stop from the

north; it seems to me that the record shows that Morton and Russell approached the same place from the south, each of them bound for the Elks Lodge. Landis says he was on the way to the Elks Lodge; Morton said the lodge was closed or about to be closed. Russell says they went to the Elks Lodge after leaving Anderson's. The testimony of the three men on this point is hard to rationalize and come out with a complete answer as to why they gathered at the truck stop when they did. I do not credit the testimony of Russell and Morton, and accept the testimony of those witnesses who said in effect that Russell checked names of employees in attendance at this important union meeting.

I find that Russell and Morton were engaged in surveillance of employee concerted activity in violation of Section 7 and Section 8(a)(1) of the Act.

The No-solicitation Rule

Rule 15, contained in the Employees Handbook, has been mentioned above. It states as a cause for discipline "soliciting on company property without permission." It is stipulated herein that the Respondent has promulgated and maintained the rule at all times and that all employees involved in this proceeding had received copies of this booklet on their date of hire.

Randles confirmed the fact that the Company has enforced such a rule and has instructed Martin or Russell to prohibit employees from engaging in union activity during their own time on company property. As I interpret the testimony of Randles, employees may, with permission from the Company, solicit during breaks and lunch hours and time off on company property, but *only with permission.* I shall find that such a rule as it is enforced is in violation of Section 8(a)(1). A non-solicitation rule is

unlawful if applied to non-working time as well as to working time. *J. R. Simplot Company Food Processing Division,* 137 NLRB 1552, 1553; *Remington Rand Corporation,* 141 NLRB 1052, 1056.

Refusal to Bargain

As set forth above, the Union requested, and the Respondent refused, to enter into collective bargaining negotiations in January. There is no issue here concerning which employees constitute the appropriate bargaining unit. The Respondent refused and continues to refuse to recognize or bargain with the Union unless and until such time as the Union proves its majority of employees in the unit, under the procedures established by Section 9 of the Act. Therefore, to determine a Section 8(a)(5) violation by the Respondent, it is necessary to find first, that the Union did have a majority on the demand date, and second that the Respondent's refusal to recognize and deal with the Union was not in good faith. I shall so find, for the following reasons:

It having been decided that the four leadmen are supervisors, the number of employees within the unit becomes 68. Therefore, on the demand date (January 11), the Union must have had to hold 35 cards for a majority. Thirty-eight authenticated cards were in the hands of the Union when demand for recognition was made. It therefore becomes unnecessary to decide whether or not employee Cullum's card is valid, he having signed and then canceled it, since if it is thrown out a showing of majority still exists (37-35). The purported withdrawal of Cook's card on about January 22 was, if real, ineffective, which would leave the union majority at 37-35. (Should Cook's authorization card be considered a nullity, the union majority is still established as 36-35.)

As to those employees who testified that they signed cards "only for a vote," a logical conclusion would support a presumption that they knew the meaning of the card; that Harris or Underwood or Rue made it quite clear to 25 of them at a meeting the importance of the event of signing such a card and what it meant on or before the dates they signed; and that Union recognition was widely discussed within the plant. They had all signed when the Union recognition demand was made. The Union had every right to rely on the authorization of each of these men at the time the demand letter was sent. *Franks Brothers* v. *N. L. R. B.*, 321 U.S. 702, 703, 705; *N. L. R. B.* v. *Stowe Manufacturing Company*, 217 F.2d 900, 904-905; *Rea Construction Company*, 137 NLRB 1769, fn. 1, 1770. The very act of signing an authorization card by an employee, absent real proof of fraud or deceit, calls for a finding that the employee knew what he was doing. *Joy Silk Mills* v. *N. L. R. B.*, 185 F.2d 732, cert. den. 341 U.S. 914. See also *Winn-Dixie, Inc.*, 143 NLRB No. 89; *N. L. R. B.* v. *Sunshine Mining Co.*, 110 F.2d 780; *Cumberland Shoe Corporation*, 144 NLRB No. 124.

Therefore, it is found that the majority of the employees within the accepted bargaining unit had authorized the Union, as of the demand date of January 11, to represent them.

As a matter of law, the authorization cards are valid for the purpose of establishing the Union's majority status; *Winn-Dixie, Inc.*, 143 NLRB No. 89; *Hyde's Super Market*, 145 NLRB 122.

The next question arises as to whether the Respondent by its refusal to recognize the Union as the bargaining agent for its employees made such refusal in good faith.

Had the Respondent been acting in good faith on January 11, it would have insisted on proof of the Union's majority status in an election. I do not believe a good-faith refusal on the part of the Respondent to bargain can be found in the face of the attendant acts by it through its agents, as related above, of interference, intimidation, and coercion. Its conduct in these respects, together with the fact that the Union did not question the claimed majority status of the Union and its refusal to have a question resolved with impartial source, leads to a conclusion that its interrogation of employees, its surveillance of the union meeting, the invocation of the no-solicitation rule, and the implied threats of loss of benefits and nonexpansion of the plant, can only impel a conclusion that the doubt expressed in writing by the Respondent on January 14 concerning the union majority was not a good-faith doubt.

The Court of Appeals for the Fourth Circuit on June 10, 1964, in *Florence Printing Company* v. *N. L. R. B.*, . F.2d , 56 LRRM 2503, enforcing 143 NLRB No. 13, rejected the employer's contention that it had a good-faith doubt as to the union's majority status, and reasoned that if the employer had any doubts, it could have agreed to the private election suggested by the union or it could have petitioned the Board under Section 9(c)(1)(B) for a representation election. Refusing to pursue either course, it acted at its peril.

In *Cumberland Shoe Corporation, supra,* the Board distinguished *Englewood Lumber Company,* 130 NLRB 394, and in Cumberland states the controlling principle obviously to be applied to the facts in the instant case. In *Cumberland,* the Board held, in part:

> We believe that the instant case is factually distinguishable from *Englewood Lumber, supra,* that hence that case is inapplicable. While it is true, as found by the

> Trial Examiner, that 17 of the signatories testified that they were told that the purpose of the cards was to secure a Board election, it does not appear that they were told that this was the only purpose of the cards. In this case the cards, on their face, explicitly authorized the Union only to act as bargaining agent of the employees, and contrary to the implied finding of the Trial Examiner, the failure of the Union's solicitors to affirmatively restate this authorization does not indicate that it was abandoned or ignored. Thus, there is no evidence here to negative the overt action of the employees in signing cards designating the Union as their bargaining agent, and the instant situation is not one in which the Union has beguiled employees into signing union cards. In view of the Respondent's threats, promises of benefits, and coercive interrogation of employees, as found by the Trial Examiner, we are persuaded that Respondent's refusal to bargain with the Union on January 23, 1963, was not the result of a good-faith doubt of the Union's majority, but in order to gain time to destroy that majority. We find, accordingly, that the Union has demonstrated this majority status and that Respondent, by refusing to recognize or bargain with it, violated Section 8(a)(5) and (1) of the Act. [Cases cited.]

See also *Winn-Dixie Stores, Inc.*, 138 NLRB 1355, 1361, 1368, fn. 12; *Solo Cup Company* v. *N. L. R. B.*, F.2d , 56 LRRM 2383 (C.A. 4, June 1, 1964).

The result reached by the Board in *Cumberland Shoe* is binding on me and is controlling on the facts as set forth above. Accordingly, I find that the Union represented a majority of Respondent's employees in an appropriate unit at the time request for recognition was made, and that the Respondent, when it then refused to recognize the Union, violated Section 8(a)(5) of the Act. See also *Gorbes, Perez & Morell, S. N. C.*, 133 NLRB 362, 363, 374. At page 363, the Board ruled:

> We agree with the Trial Examiner that Respondent violated Section 8(a)(5) by refusing to bargain with the Union after it was duly designated by a majority of its employees. We find no merit in the Respondent's contention that the authorization cards signed by the employees were obtained upon the promise that they were to be used only for the purpose of filing a petition for a representation election.

I find that by the several acts of interrogation, threats, interference, and coercion mentioned above, the Respondent has engaged in and is engaging in unfair labor practices in violation of Section 8(a)(1) of the Act. I further find by reason of the foregoing that the Respondent has engaged in unfair labor practices in that it refused and continues to refuse to bargain in good faith with a designated representative of the employees for the purpose of collective bargaining in violation of Section 8(a)(5) and (1) of the Act.

IV. The effect of the unfair labor practices upon commerce

The activities of the Respondent as set forth in section III, above, occurring in connection with the operations of the Respondent described in section I, above, have a close, intimate and substantial relation to trade, traffic and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

V. The remedy

Since it has been found that Respondent has engaged in and is engaging in unfair labor practices, I shall recommend that the Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It having been found that Respondent has engaged in and is engaging in certain acts of interference, restraint and coercion, it shall be recommended that the Respondent cease and desist therefrom.

Also, having found that Respondent has refused to bargain collectively with the Union as the exclusive representative of the employees in the above-described appropriate unit, I shall recommend that Respondent, on request, bargain collectively with the Union.

By conduct found to constitute interference, restraint and coercion, and by its refusal to bargain with the majority representative of its employees in an appropriate unit, Respondent has demonstrated a determination not to accord to employees rights which the Act was designed to protect. It reasonably may be assumed that further unfair labor practices of a same or different character may be expected to occur unless Respondent is ordered to refrain from in any manner transgressing employees' statutory rights. It will be recommended, therefore, that the Respondent be ordered to cease and desist from interfering with, restraining or coercing its employees in any manner, in the exercise of the right to self-organization, to form, join or assist labor organizations, to join or assist the Union, to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities as guaranteed in Section 7 of the Act.

Upon the basis of the foregoing findings of fact, and upon the entire record in the case, I make the following:

Conclusions of Law

1. International Association of Machinists, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

2. All production and maintenance employees, employed at Respondent's Searcy, Arkansas, plant, excluding office clerical employees, guards and supervisors as defined in the Act, constitute an appropriate unit for the purposes of collective bargaining within the meaning of 9(b) of the Act.

3. International Association of Machinists, AFL-CIO, was on January 11, 1964, and at all times thereafter has been the exclusive representative of all of the Respondent's employees in the appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

4. By interfering with, restraining and coercing its employees in the exercise of rights guaranteed in Section 7 of the Act, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

5. By refusing to bargain collectively with International Association of Machinists, AFL-CIO, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

The aforesaid labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

RECOMMENDED ORDER

Upon the entire record in the case, it is recommended that the Respondent, Jas. H. Matthews & Co., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Interrogating any of its employees regarding their membership in, or activities on behalf of, any labor organization, or taking any affirmative action to determine who among its employees are or are not members of any labor organization, or seeking to induce any of its members to withdraw from membership in the labor organization by solicitation or promises of benefit, or threatening to deny any of its employees privileges previously enjoyed by them, for the purpose of discouraging membership in a labor organization.

(b) Refusing to bargain collectively with International Association of Machinists, AFL-CIO, as the exclusive representative of all production and maintenance employees employed at Respondent's Searcy, Arkansas, plant, excluding office clerical employees, guards and supervisors as defined in the Act, with respect to rates of pay, wages, hours of employment, or other conditions of employment.

(c) In any other manner interfering with, restraining or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist International Association of Machinists, AFL-CIO, or any other organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Upon request, bargain collectively with International Association of Machinists, AFL-CIO, as the exclu-

sive bargaining agent of all of its employees in the bargaining unit described herein, with respect to rates of pay, wages, hours of employment, and other conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its office and plant in Searcy, Arkansas, copies of the attached notice marked "Appendix."[7] Copies of said notice, to be furnished by the Regional Director for the Twenty-sixth Region, shall, after being duly signed by an official representative of the Respondent, be posted by it immediately upon receipt thereof, and be maintained by it for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notice is not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for the Twenty-sixth Region, in writing, within 10 days from the date of this Trial Examiner's Decision, what steps Respondent has taken to comply herewith.[8]

Dated at Washington, D. C.

/s/ Arthur E. Reyman
Trial Examiner

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7. In the event that this Recommended Order be adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDATIONS OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

8. In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director in writing within 10 days from the date of this Decision and Order, what steps the Respondent has taken to comply herewith."

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International Union of Electrical, R. & M. Wkrs. v. *National Labor Relations Board*, 352 F. 2d 361, certiorari denied *sub nom. S.N.C. Mfg. Co.* v. *National Labor Relations Board*, 382 U.S. 902 — 9

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1286

JAMES H. MATTHEWS & CO., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1–18) is reported at 354 F. 2d 432. The Board's decision and order (Pet. App. 19–67) are reported at 149 N.L.R.B. 161.

JURISDICTION

The opinion of the court of appeals was issued on December 29, 1965 (Pet. App. 1). A petition for rehearing was denied on February 8, 1966, and the decree entered on February 9, 1966 (Pet. 2). The petition for a writ of certiorari was filed on May 6, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The National Labor Relations Board found that petitioner (the employer) wrongfully refused to bargain collectively with the union. The question presented is whether two of the Board's underlying findings—that the union had valid authorization cards from a majority of the employees in the bargaining unit, and that petitioner in fact had no good faith doubt of the union's majority status—were supported by substantial evidence.

STATUTE INVOLVED

The National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), provides:

> SEC. 8(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of * * * [their rights as to organization, collective bargaining, etc.; or]
>
> * * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [of the Act] * * *.
>
> * * * * * *
>
> SEC. 9(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining * * *.

STATEMENT

A. THE FACTS

Petitioner is a corporation engaged in various kinds of manufacturing in 17 plants throughout the United States and Canada (Pet. App. 24; R. 126, 188).[1] Its Searcy, Arkansas plant specializes in the manufacture of bronze memorial tablets and plaques (Pet. App. 24; R. 126). The plant has two general divisions, the foundry and the factory (Pet. App. 32; R. 177). About 35 employees work in the foundry and 37 in the factory, which is subdivided into four departments each headed by a department head or "leadman" (Pet. App. 33; R. 153–154).

In early January 1964, the International Association of Machinists, AFL–CIO, began an organizing campaign among the employees at the Searcy plant. On January 6, a meeting was held between union representatives and some 25 employees, and union authorization cards were distributed to the employees (Pet. App. 27; R. 69–70). The union's representative read the terms of the authorization card to the assembled employees (Pet. App. 27–28; R. 71, 232–233), and explained to them that, if a majority signed the cards, the union could "go to the Company and demand recognition and demand bargaining by asking the Company" or "you could file a petition for an election in the plant with 30 percent of the cards being signed" (Pet. App. 28; R. 71, 233). At the conclusion of

[1] "R." refers to the portions of the record printed as a joint appendix in the court below.

the meeting, most of the employees present signed cards (Pet. App. 29; R. 71).[2]

The day after the meeting, T. J. Underwood, the leading union advocate among the employees, was approached by his department head, Larry Harmon. Harmon asked how the meeting went, and warned, "[y]ou had better drop it [the union] or it will mess you up in your department" (Pet. App. 43–44; R. 74). Later the same day, Harmon told Underwood that, if he did not "drop" the union, he would get no more promotions or raises (Pet. App. 50; R. 75). On January 9, Harmon again talked to Underwood. He told him, "T. J., if a man in my department goes union, I'll make it awfully rough on him" (Pet. App. 50; R. 75); "you will lose all of your insurance, profit-sharing and all of your Company benefits" (Pet. App. 50; R. 76).[3] At a second union meeting, held on Jan-

[2] The form of the blank card reads (Pet. App. 28):

Authorization for Representative

I, the undersigned employee of * * * hereby authorize the International Association of Machinists or any District or Local Lodge thereof to represent me for purposes of Collective Bargaining and, in my behalf, to negotiate and conclude all agreements as to hours of labor, wages and other conditions of employment.

The full power and authority to act for the undersigned as described herein supersedes any power or authority heretofore given to any person or organization to represent me.

(Witness) (Signature of Employee)

Date

[3] About this time, other employees were questioned about the union by the plant superintendent (Pet. App. 43–46; R. 94–95, 96, 101–102).

uary 10 (Pet. App. 28, 54; R. 119), the plant superintendent, his assistant, and the office manager were in a room next to where the meeting was being held (Pet. App. 28; R. 103, 119), and, as the employees walked out of the meeting, the office manager checked their names off a list of employees he had attached to a clip board (Pet. App. 54–58; R. 72–73, 103–104, 108, 119, 237–239).

By January 11, 38 of petitioner's 72 employees had signed authorization cards (Pet. App. 29; R. 253–274), and on that day the union notified petitioner that it had been requested by "your employees * * * to represent them in all matters pertaining to employment covering wages, hours of service and all other conditions of employment." The letter added: "We request that you meet with us to discuss, negotiate, and enter into agreement with us [concerning] the terms and conditions of employment for all production and maintenance employees. * * * We suggest that you meet with us * * * for the purpose of establishing our showing of representation of your employees. We prefer the selection of a neutral party to be present and check our representation request against your payroll." (Pet. App. 31; R. 248–249). On January 14, the office manager of the Searcy plant replied by letter that the company would bargain with the union only if it was certified pursuant to a Board election. The company expressed no doubt at this time of the union's majority status (Pet. App. 31; R. 250).

On January 16, Roy Randles, general superintendent of the company's Bronze Division, who had been notified of the union's bargaining request, arrived in

Searcy. During the next few days, Randles talked to most of the employees about the union activity. (Pet. App. 46–48; R. 129, 131.) He told one, "I've been planning on sending a T-lug machine down here, but if we get the union in here, there isn't any need in sending it down here, because if you guys go on strike, I wouldn't have any place to make my T-lugs and furnish the other plants." Randles twice asked the employee to reconsider his decision "about the union," and stalked off in silence when he was told, "I've already got my mind made up." (Pet. App. 51, 45–46; R. 96–97.) Randles told another employee, "I hear there is a little trouble going on here," and "I don't know if I can talk to you or not. You might sue my pants off. If I could just find out or get somebody to talk to me and find out what kind of trouble is going on, I could get to the bottom of this, but everybody seems afraid to talk to me. * * * Even if I had to get them in the car and take them 40 or 50 miles" (Pet. App. 46; R. 77–78). Randles concluded by saying that he had intended to move a vase machine to the Searcy plant, but that, since "all of this trouble came up," he had changed his mind and did not think he would (Pet. App. 51; R. 78).

At about the same time, Department Head Harmon told an employee, "If we get a union in here, we won't get this vase department put in our plant" (Pet. App. 44; R. 98). And, in early February, Plant Superintendent Morton visited an employee at his work station and showed him a company insurance check made out to him. Morton said, "This is good insurance, isn't it?" The employee agreed, and Morton con-

tinued: "Do you think the union can get you this kind of insurance?" Morton then put his hand on the employee's union button, flipped it, and said, "[F]ooling with the union is going to cause you to lose that insurance." (Pet. App. 52; R. 223.)

B. THE DECISIONS BELOW

The Board found that petitioner—by coercive interrogation, threats of economic reprisal, surveillance, and other acts—had restrained its employees in the exercise of their rights to self-organization, thus violating Section 8(a)(1) of the National Labor Relations Act (Pet. App. 20, 54, 58–59, 65). The Board further found that the union had had valid authorization cards from a clear majority of the employees in the bargaining unit[4] when, on January 11, 1964, it requested recognition, and that the company had not had a good faith doubt of the union's majority status in declining that request. Accordingly, the Board concluded, the company had violated Section 8(a)(5) of the Act as well, by refusing to bargain with the union. (Pet. App. 20, 59–63, 65.) The Board ordered petitioner to cease and desist from the unfair labor practices found, and to bargain, upon request, with the union (Pet. App. 21–22, 66–67).

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[4] The Board first determined that the four department heads or leadmen were supervisors within the meaning of Section 2(11) of the Act (29 U.S.C. 152(11)), and so concluded that the bargaining unit consisted of 68 employees (Pet. App. 42–43, 59). After sustaining the company's objection to one card, the Board found that, on Jauary 11, the Union had valid authorization cards from 37 of the employees in the unit (Pet. App. 20, 59–60), a majority.

On judicial review of the Board's decision and order, the Court of Appeals for the Eighth Circuit held that the Board's findings were supported by substantial evidence, and enforced the Board's order in full (Pet. App. 1–18).

ARGUMENT

The decision of the court of appeals is clearly correct, and there is no conflict with the decision of another circuit, or any other basis for review by this Court. At issue is the validity of two subsidiary findings of the Board relating to petitioner's refusal to bargain with a duly selected representative of its employees: whether the Board properly rejected petitioner's challenge to three of the authorization cards, and whether the Board could find, as it did, that petitioner's refusal to bargain had not been motivated by any good-faith doubt of the union's majority status.

1. The court below applied well-settled principles in rejecting petitioner's challenge to three of the authorization cards. Each card (p. 4, n. 2, *supra*) clearly and unambiguously recited that by signing it an employee was thereby authorizing the union to represent him for purposes of collective bargaining; and there was no evidence that in obtaining employees' signatures the union or its agents made any misrepresentations concerning the purpose of the cards (Pet. App. 7–12). In such circumstances, it has uniformly been held that "an employee's thoughts (or afterthoughts) as to why he signed a union card, and what he thought that card meant, cannot negative the overt action of having signed a card designating a union as bargaining agent." *Joy Silk Mills, Inc.* v. *National Labor*

Relations Board, 185 F. 2d 732, 743 (C.A.D.C.), certiorari denied, 341 U.S. 914.[5]

2. An employer, of course, may not refuse to bargain with a union representing a majority of the employees of a proper bargaining unit unless he, in good faith, doubts that the union has majority status (Pet. App. 12). And obviously determination of good faith is a factual matter dependent upon the particular circumstances of each case. In the present case the Board (Pet. App. 31, 59–61), sustained by the court of appeals (Pet. App. 13–14), found as a fact that the employer had no such good faith doubt.[6] The employer resorted to coercive tactics forbidden by Section 8(a)(1) to defeat the union's organizational cam-

[5] See *Colson Corp.* v. *National Labor Relations Board*, 347 F. 2d 128, 135 (C.A. 8), certiorari denied, 382 U.S. 904; *National Labor Relations Board* v. *Geigy Co.*, 211 F. 2d 553, 556 (C.A. 9), certiorari denied, 348 U.S. 821; *National Labor Relations Board* v. *Security Plating Co.*, 356 F. 2d 725, 726–727 (C.A. 9); *National Labor Relations Board* v. *Gotham Shoe Mfg. Co.* (C.A. 2), January 14, 1966, 61 LRRM 2177; *National Labor Relations Board* v. *Cumberland Shoe Corp.*, 351 F. 2d 917, 920 (C.A. 6); *National Labor Relations Board* v. *Winn-Dixie Stores*, 341 F. 2d 750 (C.A. 6), certiorari denied, 382 U.S. 830; *International Union of Electrical, R. & M. Wkrs.* v. *National Labor Relations Board*, 352 F. 2d 361 (C.A.D.C.), certiorari denied *sub nom. S. N. C. Mfg. Co.* v. *National Labor Relations Board*, 382 U.S. 902. *National Labor Relations Board* v. *Great Atlantic & Pacific Tea Co.*, 346 F. 2d 936, 941–942 (C.A. 5), is not to the contrary. The court there was not concerned with what kind of evidence was required to impeach the validity of an authorization card. It merely held that, in the circumstances of that case, the employer's belief that the cards had been obtained through undue influence was a relevant factor in concluding that he had a good faith doubt as to the union's majority status.

[6] Petitioner's contention that it had a good faith doubt as to the propriety of the unit (Pet. 5–6) is contrary to these findings.

paign[7]—a course of conduct difficult to reconcile with good faith. In addition, as the court of appeals stressed (Pet. App. 13), the employer's bad faith was shown by his refusal to respond to the union's letter (p. 5, *supra*) inviting independent verification of its majority status. The cases cited by petitioner show no more than that, where, unlike here, the circumstances do not support an inference of bad faith, the employer may refuse to bargain.[8] There is thus no conflict.

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[7] Petitioner does not contest in this Court the finding that it violated Section 8(a)(1).

[8] In *Phelps-Dodge Copper Products Corp.* v. *National Labor Relations Board*, 354 F. 2d 591 (C.A. 7), there was no showing of coercive tactics forbidden by Section 8(a)(1). In *Reilly Tar & Chemical Corp.* v. *National Labor Relations Board*, 352 F. 2d 913 (C.A. 7), there was only one instance of unlawful interrogation and it was viewed by the court as not "very strong," since most of "the statements relied on by the Board were made in reply to questions from the employees" (352 F. 2d at 915). In *National Labor Relations Board* v. *Flomatic Corp.*, 347 F. 2d 74 (C.A. 2) (as the court explained in *Irving Air Chute Co.* v. *National Labor Relations Board*, 350 F. 2d 176, 182 (C.A. 2)), no Section 8(a)(5) (refusal to bargain) violation was found at all, and the Section 8(a)(1) violation was not "flagrant"; hence the court concluded that the Board's order to bargain was not a proper remedy.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1966.

U.S. GOVERNMENT PRINTING OFFICE: 1966